Public Charge Grounds of Inadmissibility and Deportability

I. Intro/History of the provisions

a. The public charge ground of inadmissibility and deportability have been a part of Immigration Law since the turn of the Twentieth Century
   i. The country's first immigration law, enacted in 1882, excluded aliens who were deemed "likely to become a public charge" after they came to the United States. Act of Aug. 3, 1882, 22 Stat. 58
   ii. In 1903, Congress made aliens who had migrated to the US deportable if they became a public charge within 2 years after entry (later increased to 5 years). Act of Mar. 3, 1903, 32 Stat. 1213

b. INA Section 212(a)(4) – Any alien who, in the opinion of the consular officer at the time of the application for a visa, or in the opinion of the AG at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible

c. INA Section 237(a)(5) – any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable

II. Public Charge

a. Neither the INA nor the regulations define a "public charge" for either the inadmissibility or deportability ground.
   i. DOS and USCIS have issued policy guidance defining public charge as an individual likely to become or who has become "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." – 9 FAM 302.8-2(b)(1)(a); USCIS Public Charge Fact Sheet; Pearson Memo, *infra*.

b. Determining a public charge – Inadmissibility ground
   i. "Totality of the circumstances" test – *Matter of Harutunian*, 14 I&N Dec. 583 (BIA 1974)
      1. Board notes that broader test applies for inadmissibility, as opposed to deportability, because inadmissibility is forward-looking and deportation "dislodges an established residence" in the US
   ii. Factors to consider: alien's age; health; family status; assets, resources, and financial status; education and skills
   iii. Affidavit of support should also be considered
      1. Certain family-sponsored and employment-based immigrants inadmissible if they do not submit an affidavit of support

c. Determining a public charge – deportability ground
   i. *Matter of B-*, 3 I&N Dec. 323 (BIA and AG 1948,) 3-part test
      1. The state or governing body must, by appropriate law, impose a charge for the services rendered to the alien

a. If there is no reimbursement requirement, the person cannot be a public charge

2. The authorities must make demand for payment of the charges upon those persons made liable under state law
    a. unless alien and persons legally responsible for car and maintenance are known to be destitute
3. There must be a failure to pay for the charges

ii. Within 5 Years
1. Case law interprets entry as date of last entry into the US – *see, e.g.*, *Matter of B-*, 3 I&N Dec 323, 324 (BIA and A.G. 1948)
2. An alien cannot become a public charge until a demand for payment is made, and demand for repayment must be within the 5 years. *Matter of L*, 6 I&N Dec. 349, 352 (BIA 1954)

iii. From a conditions not arising after entry
1. Alien has the burden of proving that the disease/condition did not antedate his landing in the US. *Matter of W-*, 8 I&N Dec. 630, 631 (BIA 1960). *See also Canciamilla v. Haff*, 64 F.2d 875 (9th Cir. 1933); *Ex parte Wong Nung*, 30 F.2d 766 (9th Cir. 1929); *United States ex rel. Casimano v. Commissioner of Immigration*, 15 F.2d 555 (2d Cir. 1926)

III. Affidavits of Support – INA 213; INA 213A; 8 C.F.R. 213a

a. Aliens required to submit an Affidavit of Support (Form I-864) in order to show that they are not inadmissible under section 212(a)(4)
    i. An immediate relatives (including orphans and K nonimmigrants seeking AOS) seeking admission as LPR or AOS
    ii. Family-sponsored immigrants seeking admission or AOS
    iii. Employment-based immigrants
        1. If visa petition was filed by a relative (or by an entity in which the relative has 5% or more ownership interest), relative must file an affidavit of support
            a. Relative –spouse, parent, child, sibling
            b. Applies only if relative is USC or LPR
                i. If relative is a sibling, only have to file affidavit of support if USC
        2. Other employment-based immigrants do not require an affidavit of support to prove they are admissible
    iv. An accompanying or following to join family member must submit affidavit of support if principal beneficiary was required to
b. Affidavit of Support is not required if
    i. Must file I-864W Exemption form
        1. Alien or alien's parent (while alien was minor) worked 40 qualifying quarters as defined in SSA
        2. Immediate relatives entitled to automatic citizenship upon admission

a. Child (biological or adopted) of USC, if child admitted prior to age 18
b. Orphan adopted abroad by USC such that he or she would attain citizenship upon entry
i. Affidavit of support still required for alien orphan if USC parent will not adopt child until child is in the US as LPR or if neither parent saw the child before or during adoption process

3. Self-petitioners
a. Battered spouses/children of USCs or LPRs
b. Widows/widowers

ii. Child born subsequent to the issuance of an immigrant visa to his or her accompanying parent or child born to LPR mother during temporary visit abroad – 8 C.F.R. 213a.2(a)(2)(ii)
iii. Diversity immigrants – 9 FAM 302.8-2(B)(2)(d)(3)
iv. Nonimmigrants – including K visa (fiancé visa)
1. Must still show they will not be a public charge, but as FAM notes, evidence establishing that alien is entitled to a nonimmigrant status classification is generally sufficient to meet the requirements to show will not be public charge, absent special circumstances

c. I-864 Affidavit of Support requirements
i. Requirements to be a sponsor
1. USC or LPR
2. 18+
3. Domiciled in US
4. Filed visa petition for alien (or relative and employment visa)
a. Substitute-sponsors – if petitioner has died after petition was approved (and DHS didn't revoke) or alien seeking AOS as surviving relative under 204(L), sponsor can be anyone who meets other requirements and is a spouse, parent, in-law(parent, child, sibling), sibling, child over 18, grandparent, or grandchild of alien
5. Demonstrates the means to maintain an annual income equal to at least 125% of poverty line
a. Active duty military petitioning for spouse or child must only show 100% of poverty line

ii. Sponsor agrees to maintain alien above 125% of Federal poverty line during period in which affidavit is enforceable
1. Until alien naturalizes, OR
2. Until alien has worked/can be credited with 40 qualifying quarters under SSA and didn't received any federal means-tested public benefits
iii. If sponsor cannot meet income requirements, co-sponsors allowed
iv. Affidavit is legally enforceable as a contract against sponsor by the alien or by any entity that provides any means-tested public benefit

d. Aliens not required to file an I-864, but who are inadmissible under section 212(a)(4) may post bond or submit I-134 Affidavit of support – INA 213
    i. I-134 is not legally enforceable and entitled to less weight than I-864

IV. Aliens excluded from public charge inadmissibility ground

a. Refugees and asylees (initial admission and adjustment of status) – Sections 208, 209(c)
b. Cuban Adjustment - *Matter of Mesa*, 12 I. & N. Dec. 432, 437 (Dep. Assoc. Comm'r 1967)
c. NACARA - 8 C.F.R. 1240.66
d. TPS – 8 C.F.R. 244.3(a)
e. Some categories of special immigrants, including SIJ – section 245(h)
f. U visa nonimmigrants and adjustment – Section 212(a)(4)(E), 245(m)
g. T visa nonimmigrants – section 212(d)(13)
    i. T visa adjustment – public charge ground can be waived – section 245(l)(2)

V. Receipt of public benefits

a. In response to questions raised after the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) regarding the effect of receipt of public benefits by an alien on the public charge determination, the INS proposed regulations in 1999. However, these regulations were never finalized
b. However, at the same time as the proposed regulations, the INS issued a field guide on inadmissibility and deportability on public grounds
    i. Referred to as the "Pearson memorandum" - Dep't of Justice, Immigration & Naturalization Serv., Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999).
    ii. Continues to guide DOS and DHS's consideration of public charge determinations
c. While receipt of public benefits in the past can be considered in the 212(a)(4) public charge determination, it is not dispositive. *Matter of Perez*, 15 I&N Dec. 136, 137 (BIA 1974)
    i. *Matter of A-*, 19 I&N Dec. 867 (BIA 1988) (holding that alien was not likely to be public charge although family had received public cash assistance for nearly four years, because alien was young, had no physical or mental defect that might affect her earning capacity, and had recently begun working)
    ii. *Matter of Harutunian*, 14 I&N Dec 583 (Comm. 1974) (holding that an applicant who is 70 yrs old, lacks means of supporting herself, has no one responsible for her support, and who expects to be dependent for support on old-age assistance is ineligible for a visa under public charge excludability ground even though the state from which she will receive old-age assistance does not permit reimbursement)
    iii. *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421-22 (BIA 1962, A.G. 1964) ("The general tenor of the holdings is that the statute [section 212(a)(15) of the Act] requires more than a showing of a possibility that the alien will require public support. Some specific circumstance, such as mental or physical disability,

advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency").

d. DOS and USCIS policy guidance include a list of public benefits that are not considered public cash benefits for the purposes of the public charge inadmissibility ground. USCIS Public Charge Fact Sheet; 9 FAM 302.8-2(b)(1)
    i. Non-cash benefits and special-purpose cash assistance generally not taken into account for the purposes of public charge ground because they are considered supplemental in nature and do not make a person primarily dependent on the government for subsistence.

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Training

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I,_____, certify that I have reviewed, in its entirety, the video presentation entitled, **Public Charge Grounds of Inadmissibility**, sponsored by the Board of Immigration Appeals Training & Development Program.

Signature: _____

Date: _____

Grounds of Deportability and Inadmissibility

1

- Section 237(a)(4)(B) – an alien described in subparagraph (B) or (F) of section 212(a)(3) is deportable.
- Section 212(a)(3)(B) lists [illegible] of inadmissibility
- Section 212(a)(3)(F) lists [illegible] of inadmissibility

TRIG Bars to Relief

2

- Refugee admission – section 207(c)(3)
  - AG cannot waive TRIG at section 212(a)(3)(B)

TRIG Bars to Relief

3

- Asylum – Section 208(b)(2)(A)(v)
  - Alien described under subclause (I), (II), (III), (IV), and (VI) of section 212(a)(3)(B)(i), or section 237(a)(4)(B) barred from asylum

TRIG Bars to Relief

4

- Cancellation of Removal – section 240A(c)(4)
  - An alien inadmissible under section 212(a)(3) or deportable under section 237(a)(4) is ineligible for COR under sections 240A(a) and (b)(1).

TRIG Bars to Relief

5

- Withholding of Removal – section 241(b)(3)(B)(iv)
  - Aliens described in section 237(a)(4)(B) considered to pose a danger to the security of the U.S.
  - REMEMBER: Section 237(a)(4)(B) references sections 212(a)(3)(B) and (F)

TRIG Bars to Relief

6

- Temporary Protected Status – Section 244(c)(2)(A)(iii)(III)
  - The AG may not waive section 212(a)(3)(B)
- Adjustment of Status
  - Section 245(c)(6) – An alien deportable under section 237(a)(4)(B) is ineligible for adjustment
  - Section 245(i)(2)(A) – An alien must be admissible to adjust under 245(i)

TRIG Bars to Relief - Regulatory

7

- Withholding under the CAT – 8 C.F.R. § 1208.16(d)(2
  - Aliens who fall under section 241(b)(3)(B) are ineligible for CAT withholding
  - May still be granted deferral under the CAT under 8 C.F.R. § 1208.17

TRIG Bars to Relief - Regulatory

8

- Special Rule Cancellation under NACARA – 8 C.F.R. § 1240.66(b)(1)
  - May not be inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B)

Section 212(a)(3)(B)

9

- (B)(i) – lists the grounds of inadmissibility
  - Aliens who engage in terrorist activity
  - Members or representatives of terrorist organization
  - Endorse or support a terrorist organization
  - Spouses and children of inadmissible aliens described above

Section 212(a)(3)(B)(iii) – Terrorist Activity

10

- (B)(iii) – defines "terrorist activity"
  - kidnapping, assassination, hijacking, and bombing (and attempts to do these acts)
  - Use of a firearm w/ intent to endanger safety of another or cause substantial damage to property
  - Very expansive definition

Section 212(a)(3)(B)(iv) – Engage in Terrorist activity

11

- "Engage in terrorist activity" - Describes actions a person might take to aid terrorism including:
  - Planning or executing terrorist activity
  - Soliciting members or money for terrorist activity or terrorist organization
  - Soliciting money for terrorist activity or terrorist organization

Section 212(a)(3)(B)(vi) – Terrorist Organization

12

- **Tier I** – Secretary of State designates the groups under section 219 of the Act
- **Tier II** – Secretary of State, in consultation with Secretary of DHS and the Attorney General, designates groups

Section 212(a)(3)(B)(vi) – Terrorist Organization

13

- Tier III – "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activities
  - Not designated
  - IJ determines on case-by-case basis

Example – Is alien inadmissible under TRIG?

14

- SK, a native of Burma, gave money, a camera, and binoculars to the Chin National Front (CNF)
- CNF is a group defending ethnic Chin people from Burma's military regime
  - Uses firearms and explosives
- SK applied for asylum
- Is SK inadmissible under section 212(a)(3)(B)(i)(I) as an alien who engaged in terrorist activity?

Example – TRIG Inadmissibility

15

- Donating money and equipment to CNF constitutes material support
- CNF has committed terrorist activity – use of firearms and explosives

Result: SK is inadmissible under section 212(a)(3)(B)(i)(I)

SK is also barred from asylum and withholding based on TRIG, but may obtain deferral of removal under the CAT

Material Support – Specific Issues

16

- Knowledge exception
- Duress exception
- De minimis exception
- Non-violent or non-terrorist activities
- Terrorist organization
- Burden of proof

Section 212(a)(3)(B)(iv)(VI) – Material Support Bar

17

- Knowledge exception
  - if alien can "demonstrate by clear and convincing evidence that the actor did not know, or should not reasonably have known, that the organization was a terrorist organization."
  - Applies only for Tier III organizations (no knowledge exception for Tier I or II)

Section 212(a)(3)(B)(iv)(VI) – Material Support Bar

18

- Knowledge exception
- Seventh Circuit has held that "[a]n entire organization does not automatically become a terrorist organization just because some members of the group commit terrorist acts. The question is one of authorization."
- The person "may not know whether he is supporting a terrorist organization until he knows which acts are authorized." *Khan v. Holder*, 766 F.3d 689 (7th Cir. 2014).

Section 212(a)(3)(B)(iv)(VI) – Material Support Bar

19

- No Duress Exception
  - *Matter of M-H-S*, 26 I&N Dec. 757 (BIA 2016) – material support bar applies even if support was provided involuntarily, under duress or coercion

Section 212(a)(3)(B)(iv)(VI) – Material Support Bar

20

- De minimis exception
  - Also known as a "materiality" requirement
  - Neither the Board nor the Courts of Appeals have directly addressed whether there is a de minimis exception
  - However, both have upheld findings that alien's low-level activities for a terrorist organization constitutes material support

Section 212(a)(3)(B)(iv)(VI) – Material Support Bar

21

- Non-violent or non-terrorist activities
  - The material support bar includes giving to terrorist organization's peaceful activities
    - Peaceful activities can be used to promote the organization, solicit funds, recruit supporters, and appear as a legitimate organization
    - Giving money to non-terrorist activities makes other funds available for terrorist activities

Section 212(a)(3)(B)(iv)(VI) – Material Support Bar

22

- Terrorist Organizations
  - Tier I and II groups easily identified – listed on DOS website
  - Tier III – there must be sufficient evidence that group carried out "terrorist activity"
    - Terrorist activity must be unlawful in country where committed or in US
    - No exception for justifiable force against illegitimate government

Section 212(a)(3)(B)(iv)(VI) – Material Support Bar

23

- Burden of Proof
  - "If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of providing by a preponderance of the evidence that such grounds do not apply." – 8 C.F.R. § 1240.8(d)

Section 212(a)(3)(B)(iv)(VI) – Material Support Bar

24

- Burden of Proof
  - Board has recently held that this is not an onerous standard and means less than a preponderance of the evidence. *Matter of M-B-C-*, 27 I&N Dec. 31 (BIA 2017).

TRIG Statutory Exemption – Section 212(d)(3)(B)

25

- IJ and Board can determine whether statutory exemption applies, but do not have authority to adjudicate it
  - USCIS adjudicates exemption
- In TRIG cases, IJ and Board must decide whether an alien is otherwise eligible for the immigration benefit sought.
  - Chairman's Memo (BIA 14-04)

TRIG Exemption - Process

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- Secretaries of State and Homeland Security are authorized to grant exemptions to aliens who are inadmissible under section 212(a)(3)(B) of the Act
  - Group-based exemptions
  - Situational exemptions
- New exemptions authorized on an ongoing basis
  - Listed on USCIS TRIG Exemption page

TRIG Exemption - Process

27

- Once categories of exemptions authorized, USCIS determine if alien is eligible for exemption
  AND
  whether it should be granted under totality of the circumstances

TRIG Exemption - Process

28

- USCIS decision on whether to grant exemption is final and unreviewable
  - If exemption is granted, parties file joint motion to reopen

TRIG & the Material Support Bar

I. Introduction

A review of recent case law reveals that the most frequently litigated issue involving the terrorism-related provisions of the Immigration and Nationality Act is the application of the material support bar codified at section 212(a)(3)(B)(iv)(VI) of the Act.

This document provides an overview of the terrorism-related grounds of inadmissibility ("TRIG") provisions in the Act with a focus on the material support bar.[1] It will start by identifying the terrorism-related grounds of inadmissibility and deportability and the statutory bars to relief. Next, this document will examine the core TRIG provision in the Act: subparagraph (B) of section 212(a)(3) of the Act. Third, it will focus on issues specific to the material support bar. Finally, this document will address section 212(d)(3)(B) of the Act, the exemption to the TRIG bar.

II. TRIG Provisions of the Act

A. Grounds of Inadmissibility and Deportability

Terrorist activity can form the basis of both inadmissibility and deportability. Specifically, section 212(a)(3)(B) makes inadmissible any alien who is a member of a terrorist organization, has endorsed or espoused terrorist activities or persuaded others to do so, has received military training from a terrorist organization, or has engaged in or is likely to engage in terrorist activity. *See* section 212(a)(3)(B)(i) of the Act. In addition, section 212(a)(3)(F) of the Act makes inadmissible any alien who is associated with a terrorist organization and intends while in the United States to engage in activities that could endanger the welfare, safety, or security of the United States.

With regard to deportability, section 237(a)(4)(B) of the Act makes any alien who is described in sections 212(a)(3)(B) or (F) deportable.

B. Statutory and Regulatory TRIG Bars

An alien who is inadmissible or deportable under the TRIG is barred from LPR and non-LPR cancellation of removal under section 240A(c)(4) of the Act, special rule cancellation under 8 C.F.R. § 1240.66(b)(1), and adjustment of status under section 245(c)(6) of the Act.

An alien described in subclause (I), (II), (III), (IV), or (VI) of section 212(a)(3)(B)(i) or in section 237(a)(4)(B) of the Act is ineligible for asylum under section 208(b)(2)(A)(v) of the Act. In an unpublished case, the Board concluded that section 208(a)(2)(A)(v) of the Act is ambiguous because on the one hand it references five of the nine subclauses of section 212(a)(3)(B)(i), and on the other hand it references section

[1] The TRIG were added to the Act through the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. Since then Congress has greatly expanded these provisions. For further information regarding the legislative history of the TRIG, refer to the handout entitled "Evolution of Statutory Language – Terrorism-Related Inadmissibility Grounds (TRIG) and Exemption Provisions," provided at the August 11, 2015, Terrorism-Related Inadmissibility Grounds (TRIG) & Exemptions training, available on the BIA Training webpage.

237(a)(4)(B) of the Act which includes all nine of those subclauses. The Board interpreted section 208(a)(2)(A)(v) of the Act to bar an alien described in any of the nine subclauses of section 212(a)(3)(B)(i) of the Act. *See* Ibrahim Jalloh, A200 624 400 (BIA Aug. 13, 2014).

An alien described in section 237(a)(4)(B) of the Act is also ineligible for withholding of removal under the Act and the Convention Against Torture. *See* section 241(b)(3)(B) of the Act; 8 C.F.R. § 1208.16(d)(2). However, these aliens may still seek deferral of removal under the Convention Against Torture. 8 C.F.R. § 1208.17.

Additionally, the TRIG cannot be waived like certain other grounds of inadmissibility. For example, aliens seeking admission into the United States as refugees may obtain a waiver for certain grounds of inadmissibility under section 212(a) of the Act, but not the TRIG. *See* section 207(c)(3) of the Act. Similarly, aliens applying for temporary protected status can obtain a waiver for some grounds of inadmissibility, but not the TRIG. *See* section 244(c)(2)(A)(iii)(III) of the Act.

III. Section 212(a)(3)(B) of the Act

The core TRIG provision in the Act is section 212(a)(3)(B), which is composed of six clauses. Clause (i) lists the terrorist-related grounds of inadmissibility. Under that clause, an alien is inadmissible if he (1) has engaged in a terrorist activity; (2) there are reasonable grounds to believe he is engaged in or likely to engage in terrorist activity after entry; (3) has incited terrorist activity; (4) is a representative of or member of a terrorist organization; (5) endorses or supports a terrorist organization, or persuades others to do so; or (6) has received military-type training from a terrorist organization. Spouses and children of aliens inadmissible under these grounds are also inadmissible if the terrorism-related activity occurred within five years, unless the spouse or child did not know or have reason to know of the activity or renounced the relative's terrorist activity. *See* sections 212(a)(3)(B)(i)(IX), (ii) of the Act.

The remaining clauses define "terrorist activity," "engage in terrorist activity," "representative," and "terrorist organization." *See* sections 212(a)(3)(B)(iii), (iv), (v), (vi). Although these definitions are expansive, circuit courts have held that they are not impermissibly vague. *See e.g., Hussain v. Mukasey*, 518 F.3d 534, 537 (7th Cir. 2008); *Khan v. Holder*, 584 F.3d 773, 785-86 (9th Cir. 2009).

Clause (iii) defines the term "terrorist activity" by listing activities associated with terrorism like assassination and high jacking. *See* section 212(a)(3)(B)(iii) of the Act. Yet, the definition is so expansive it includes actions not usually associated with terrorism. *See Hussain v. Mukasey*, 518 F.3d at 537 (noting that the broad definition encompasses "a pair of kidnappers"). For example, the term includes the use of a firearm with the intent to endanger the safety of one or more individuals or to cause substantial damage to property. *See* section 212(a)(3)(B)(iii)(V)(b) of the Act; *Matter of S-K- ("Matter of S-K- I")*, 23 I&N Dec. 936, 948 (BIA 2006) (Osuna, concurring) ("Any group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization.").[2]

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[2] This case was later remanded to the Board for further proceedings by the Attorney General in *Matter of S-K-* ("*Matter of S-K- II*"), 24 I&N Dec. 289 (A.G. 2007). Subsequent to remand, we held that *Matter of S-K- II* did not affect the precedential nature of the Board's conclusions in *Matter of S-K- I* regarding the applicability and interpretation of the material support provisions in section 212(a)(3)(B)(iv)(VI) of the Act. *Matter of S-K-* ("*Matter of S-K- III*"), 24 I&N Dec. 475 (BIA 2008).

A "terrorist activity" must be "unlawful under the laws of the place where committed," or would be unlawful under the laws of the United States or any State, if it had been committed there. *See* section 212(a)(3)(B)(iii) of the Act. While the activity must be unlawful an alien can commit a "terrorist activity" even if he has not been convicted of a criminal offense for that action. *Cf. Zumel v. Lynch*, 803 F.3d 463, 473 (9th Cir. 2015) (holding that a grant of amnesty for the offense does not affect the unlawfulness of the action).

The "terrorist activity" definition does not contain an exception for justifiable force used against an illegitimate government. *See Matter of S-K-*, 23 I&N Dec. at 941. In fact, as the Ninth Circuit acknowledged, armed resistance by the Jews against the Nazi regime in Germany would constitute "terrorist activity" under the Act. *See Khan v. Holder*, 584 F.3d 773, 781, 784-85 (9th Cir. 2009); *see also McAllister v. Att'y Gen. of U.S.*, 444 F.3d 178 (3d Cir. 2006). *See generally* Chaya M. Citrin, "One Person's Freedom Fighter, Duress, and the Terrorism Bar," *Immigration Law Advisor*, Vol. 10, No. 7 (Sept.-Oct. 2016).

Clause (iv) defines "engage in terrorist activity," to include committing, inciting, preparing or planning a terrorist activity, as well as soliciting money or members for a terrorist activity or terrorist organization. *See* section 212(a)(3)(B)(iv) of the Act. It also includes providing material support for a terrorist activity, or to a terrorist or a terrorist organization. *Id.*

Clause (vi) defines "terrorist organization" under a three-tiered system. Tier I terrorist organizations are those organizations designated by the Secretary of State as Foreign Terrorist Organizations ("FTO") under section 219 of the Act. *See* section 212(a)(3)(B)(vi)(I) of the Act. An FTO is a foreign organization that is engaged in—or retains the capability and intent to engage in—terrorism or terrorist activities, where such acts represent a threat to national security or the security of U.S. nationals. Section 219(a)(1) of the Act; *see* Denise Bell, "Tier III Terrorist Organizations: The Role of the Immigration Court in Making Terrorist Determinations," *Immigration Law Advisor*, Vol. 10, No. 5 (July 2016).

The Secretary of State, in consultation with the Secretary of the DHS and the Attorney General, designates the organizations on the Terrorist Exclusion List ("TEL"), also known as Tier II terrorist organizations. *See* section 212(a)(3)(B)(vi)(II) of the Act. TEL groups are those that engage in terrorist activity as described in sections 212(a)(3)(B)(iv)(I)-(VI) of the Act.

Unlike Tiers I and II, Tier III terrorist organizations are not designated. Instead, an Immigration Judge in removal proceedings determines on a case-by-case basis whether a group is a Tier III terrorist organization. A Tier III terrorist organization is defined as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in," terrorist activities. Section 212(a)(3)(B)(vi)(III) of the Act. *See generally* Bell, "Tier III Terrorist Organizations," *supra.* Unlike Tier I organizations, a group can be considered a Tier III organization without a showing that it endangers U.S. national security or U.S. nationals. *Hussain v. Mukasey*, 518 F.3d at 538.

IV. Understanding the Material Support Bar

The material support bar appears in the definition of "engaging in terrorist activity." An alien engages in terrorist activity under section 212(a)(3)(B)(iv)(VI) of the Act, when he or she commits an act the individual knows or has reason to know affords "material support" (1) for a terrorist activity; (2) to a person

the alien knows or has reason to know has committed or plans to commit a terrorist activity; (3) to a Tier I or Tier II terrorist organization; or (4) to a Tier III organization, unless the alien can show by clear and convincing evidence that he or she did not know and had no reason to know that the organization was a terrorist organization.

The Act illustrates but does not define the term "material support." Material support can include: providing "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training." Section 212(a)(3)(B)(iv)(VI) of the Act. Material support has been held to include giving food, shelter, or a small amount of money or supplies to a terrorist organization or a member of such an organization. *See e.g., Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298-301 (3d Cir. 2004) (holding that providing food and setting up tents at meetings for members of a terrorist organization constituted "material support").

In determining whether an alien has provided material support within the meaning of the Act, adjudicators must resolve several key issues: If the alien gives material support to a group, is it a terrorist organization? If the group is a Tier III organization, can the alien demonstrate that he did not know or should not reasonably have known it was a terrorist organization? Is an alien subject to the material support bar if he acted under duress? Is an alien subject to the material support bar if he gave insignificant or *de minimis* support? Is an alien subject to the material support bar if he supported only non-violent activities of the organization? Who bears the burden of proof when the material support bar is at issue? Is an alien subject to the TRIG bar if he engaged in terrorist activity with an organization before it was designated as a terrorist organization? These questions are addressed below.

A. Terrorist Organizations

In determining whether an alien is subject to the material support bar, adjudicators must determine whether the organization to which the alien provided support was a terrorist organization. Designated Tier I and Tier II terrorist organizations are easily identified on publicly-available lists on the State Department website.[3]

As noted above, Tier III terrorist organizations are not designated like Tiers I and II. Instead, Tier III determinations are made on a case-by-case basis. Several factors are relevant to making a Tier III determination. First, there must be sufficient evidence that the group carried out a "terrorist activity," as defined in section 212(a)(3)(B)(iii) of the Act. *See Khan v. Holder*, 584 F.3d at 785 (finding that killing politicians, kidnapping a politician's daughter, and attacking Indian military convoys are "terrorist activities"). *Compare Bojnoordi v. Holder*, 757 F.3d 1075, 1078 (9th Cir. 2014) (discussing evidence that the group "assassinated six United States nationals" and staged attacks in Iran killing U.S. workers) *with Budiono v. Lynch*, 837 F.3d 1042, 1049-51 (9th Cir. 2016) (finding no evidence that the group used weapons, and thus concluding that it was not a terrorist organization).

[3] The current list of designated FTOs, or Tier I terrorist organizations, is available at https://www.state.gov/j/ct/rls/other/des/123085.htm. The current list of TEL groups, or Tier II terrorist organizations, is available at https://www.state.gov/j/ct/rls/other/des/123086.htm.

Second, at least within the Third and Seventh Circuits, a group cannot be classified as a Tier III organization without some evidence that the group leaders authorized or condoned the terrorist activity of some of its members. *See Uddin v. Att'y Gen. of U.S.,* 870 F.3d 282 (3d Cir. 2017) (holding that "absent such a finding regarding authorization by a group's leaders, Tier III status cannot be assigned to a group"); *Khan v. Holder*, 766 F.3d 689, 699 (7th Cir. 2014) ("An entire organization does not automatically become a terrorist organization just become some members of the group commit terrorist acts. The question is one of authorization.").

The Seventh Circuit determined "that the phrase 'a group . . . which engages in' terrorist activity under [Tier III] is ambiguous because it [is] unclear whether a group which contains some members who resort to terrorist acts, without the group's sanction, has 'engage[d] in' terrorist activity." *See Hussain v. Mukasey*, 518 F.3d at 538. The court ultimately concluded that to be considered a Tier III terrorist organization, the group must authorize, ratify, or otherwise approve or condone terrorist activity committed by its individual members. *Id.* (citing *NAACP v. Claiborne Hardware Co.* 458 U.S. 886, 930-32 (1982)).

The authorization need not be explicit and can be inferred from the failure of group's leadership to condemn the members' activities and from the fact that most of the organization's members commit terrorist activity. *See Viegas v. Holder*, 699 F.3d 798, 802 (4th Cir. 2012) (noting that the DHS had met its burden to establish that the terrorism bar may apply based on evidence that "most, if not all," of the FLEC factions "include military wings [that] engaged in violence" (alteration in original)); *Hussain v. Mukasey*, 518 F.3d 539 (concluding that where members of an organization "committed a number of acts of armed violence" and the group's leaders "did not criticize, or make efforts to curb, that violence[,] an inference that it was authorized is inescapable"); *see also* Shoeb Iqbal Babu, A202 132 978, at *5 (BIA Dec. 16, 2016).

A third factor to consider is whether a group's affiliation with a recognized terrorist organization is sufficient to classify it as a Tier III organization. The Board confronted this issue in a unpublished decision, concluding that the plain language of section 212(a)(3)(B)(vi)(III) of the Act does not provide that a group becomes a Tier III organization as a consequence of mere "affiliation" with a terrorist organization. *See* Shoeb Iqbal Babu, A202 132 978, at *6-7 (BIA Dec. 16, 2016). However, the Board distinguished instances in which the group in question was *significantly* affiliated with the terrorist organization, such that the terrorist organization could be considered a "subgroup" within the meaning of section 212(a)(3)(B)(vi)(III) of the Act. *See id.*

B. Knowledge Exception

For Tier III organizations, the material support provision does not apply if the alien "demonstrates by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization." Section 212(a)(3)(B)(iv)(VI)(dd) of the Act; *see S.A.B. v. Boente*, 847 F.3d 542, 546 (7th Cir. 2017) (finding that the alien did not establish by clear and convincing evidence that she did not know and should not reasonably have known that the OLF was a terrorist organization). The knowledge exception does not apply to aliens who give material support to a Tier I or Tier II organization. *Compare* section 212(a)(3)(B)(iv)(VI)(cc) *with* (dd) of the Act.

The Sixth Circuit has warned against attributing too much political sophistication to an alien with minimal involvement with a terrorist organization. In *Daneshvar v. Ashcroft*, 355 F.3d 615, 628

(6th Cir. 2004), the court found that an alien who, at the age of 16, sold newspapers for the MEK, which supported an armed revolt against the Iranian government was not barred under the TRIG, observing that the alien had voluntarily disassociated from the MEK a year after he joined it and had testified that he did not know of the group's violent activities until he left the group.

Additionally, as discussed above, a group does not automatically become a terrorist organization when some of its members commit terrorist acts. The group leadership must authorize the terrorist activities. *See Khan v. Holder*, 766 F.3d 689, 699 (7th Cir. 2014). Thus, an alien "may not know whether he is supporting a terrorist organization until he knows which acts are authorized" by the leadership. *Id.*

C. Duress Exception

Last year the Board ruled that the material support bar under section 212(a)(3)(B)(iv)(VI) applies even though the alien establishes that material support was provided involuntarily, under duress or by coercion. *See Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016) (observing that the Third, Fourth, Ninth, and Eleventh Circuits had held in published decisions that the material support bar does not include an implied exception for aliens who provided material support to a terrorist organization under duress). However, as discussed below, such individuals may be able to obtain an exemption from USCIS.

D. *De Minimis* Exception

Aliens have argued that because their support has been so insignificant or *de minimis* that it cannot be considered "material" support. *See Jabateh v. Lynch*, 845 F.3d 332, 343-49 (7th Cir. 2017) (Hamilton, concurring in judgement) (arguing that the support was not "material" because the alien's translator services were sporadic, unpaid, and were for a member of the Tier III organization's personal affairs, not for the organization itself). To date, the Board and the circuit courts have upheld findings that an alien's low-level activities for a terrorist organization constitutes material support, *e.g. Sesay v. Att'y Gen. of U.S.*, 787 F.3d 215, 221 (3d Cir. 2015) (collecting cases). However, neither the Board nor the Courts have directly addressed in a precedent decision whether there a *de minimis* exception to the material support provision. *See Sesay v. Att'y Gen. of U.S.*, 787 F.3d at 221 (observing that the "BIA and Courts of Appeals have not squarely addressed whether a *de minimis* exception exists in the statute"); *Matter of S-K-*, 23 I&N Dec. at 943, 945 (BIA 2006) (observing that "Congress has not expressly indicated its intent to provide an exception for contributions which are *de minimis*," but not reaching the issue).

E. Non-violent or non-terrorist activities

The Board and the circuit courts have held that an alien's contribution to a terrorist organization's *peaceful* activities constitutes material support to a terrorist organization. *See e.g. Jabateh v. Lynch*, 845 F.3d at 340 (holding that an alien's "sporadic and infrequent" interpreter services to a LURD member "for medical appointments and social errands" constituted material support); *Khan v. Holder,* 584 F.3d 773, 777 (9th Cir. 2009) ("An alien's intention in soliciting funds only for nonviolent activity is irrelevant . . . even when an organization has separate political and militant wings, because money donated to an organization's political wing is considered to be support for the militant wing as well."); *Hussain v. Mukasey*, 518 F.3d at 538 ("If you provide material support to a terrorist organization, you are engaged in terrorist activity even if your support is confined to the nonterrorist activities of the organization."); *Singh-Kaur v. Ashcroft*, 385

F.3d at 301 (holding that providing food and shelter to militant Sikhs constituted material support to persons who had committed or planned to commit terrorist activities). The Board and the circuit courts reason that peaceful activities can be used by the terrorist organization as a way to promote the organization, solicit funds, recruit supporters, and appear as a legitimate organization. *Jabateh v. Lynch*, 845 F.3d at 341. The Board observed that giving money to an organization's non-terrorist activities makes other funds available for terrorist activities. *See Matter of S-K-*, 23 I&N Dec. at 944.

The position taken by the Board and the circuit courts is congruent with the Supreme Court's broad view of "material support" in the context of the criminal statute prohibiting material support to a terrorist organization. The Court found that some terrorist organizations "use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations." *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 30-31 (2010) (quoting Declaration of Kenneth R. McKune).

F. Burden of Proof

The alien bears the burden to establish eligibility for relief from removal. *See* section 240(c)(4)(A) of the Act. Under 8 C.F.R. § 1240.8(d), "if the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of providing by a preponderance of the evidence that such grounds do not apply." The regulations do not explicitly state who bears the initial burden of proof, but the Board has stated that the DHS bears the initial burden. *See Matter of S-K-*, 23 I&N Dec. at 939. The Board found that the regulatory terms "indicates" and "may apply" do "not create an onerous standard and necessarily means a showing less than a preponderance of the evidence standard." *See Matter of M-B-C-*, 27 I&N Dec. 31, 36-37 (BIA 2017). The Board held that "where the record contains some evidence from which a reasonable fact finder could conclude that one or more grounds for mandatory denial of the application may apply, the alien bears the burden under 8 C.F.R. § 1240.8(d) to prove by a preponderance of the evidence that such grounds do not apply." *Id.*

Shortly before the Board issued *Matter of M-B-C-*, the Ninth Circuit held that it would apply the same burden-of-proof framework in the TRIG bar context as it does in the persecutor bar context. *See Budiono v. Lynch*, 837 F.3d 1042, 1048-49 (9th Cir. 2016). The DHS must make a threshold evidentiary showing that each element of the TRIG bar could be met before the burden shifts to the alien. The Court reasoned that this threshold showing "is especially important in the terrorism context, where the definition of a terrorist organization, and terrorist activity, is unusually broad." *Id.* The Court specified that the "record evidence must raise the inference that each element of the bar applies." *Id.*

In determining whether the record evidence is sufficient to indicate that the TRIG bar may apply, the Immigration Judge must consider the reliability and specificity of the record evidence. *See Matter of S-K-*, 23 I&N Dec. at 941 (finding evidence that the group used "firearms and/or explosives to engage in combat" with the Burmese government sufficient to indicate the terrorism bar applied); *see also Viegas v. Holder*, 699 F.3d at 802 (finding no error in the Board's decision that the DHS met its initial burden by presenting evidence that the alien belonged to an organization in which some components engage in violence, thereby shifting the burden to the alien to show the TRIG bar did not apply "because he belonged to a separate, nonviolent organization."). Md Ala Uddin, A206 358 829 (BIA Jan. 30, 2017) at *2-3 ([T]he Immigration Judge should focus on reliable evidence in the record, taking into account the independence and reputation

of the sources of potentially relevant information, and consider the latest evidence of conditions in [the country].").

G. Timing

Engaging in terrorist activity at any time will make an alien inadmissible and deportable, and will bar him or her from various forms of relief, as discussed above. *See, e.g., Khan v. Holder*, 584 F.3d at 777 (9th Cir. 2009) (noting that engaging in terrorist activity at any time will bar an alien from asylum and withholding of removal). However, some provisions apply only to an alien who is a current member of a terrorist organization, and thus would not apply to former members. *See* sections 212(a)(3)(B)(i)(I),(V), (VI) of the Act; *Viegas v. Holder*, 699 F.3d at 804 (observing that section 212(a)(3)(B)(i)(V) of the Act, applies only to current members of a terrorist organization, not former members).

An alien who engages in terrorist activities with respect to a Tier I or Tier II organization, is barred only if the organization was so designated at the time he engaged in such activity. *See* section 212, Note 14.2 of the Act; *see also Daneshvar v. Ashcroft*, 355 F.3d 615, 627 & n.11 (6th Cir. 2004). Similarly, a Tier III organization must have met the definition of a Tier III at the time an alien engages in terrorist activity with respect to it. *Bojnoordi v. Holder*, 757 F.3d at 1077-78; *Alturo v. U.S. Att'y Gen.*, 716 F.3d 1310, 1313 (11th Cir. 2013); *Viegas v. Holder*, 699 F.3d at 802.

Notably, an alien who engages in terrorist activities with respect to a Tier III organization, will be subject to the TRIG bar regardless of whether such activity took place prior to the enactment of the bar. *See* section 212, Note 14.2 of the Act; *see also Bojnoordi v. Holder*, 757 F.3d at 1077 (holding that the statutory terrorism bar applies retroactively to an alien's material support of a Tier III organization); *Daneshvar v. Ashcroft*, 355 F.3d at 627 (determining that the Board was correct in finding that the MEK was a Tier III organization during the 1970s).

V. The Statutory Exemption

Immigration Judges and the Board have authority to decide whether an alien is inadmissible or deportable under the TRIG. But the Immigration Judges and the Board are without authority to adjudicate the statutory exemption under section 212(d)(3)(B) of the Act. *See Matter of M-H-Z-*, 26 I&N Dec. 757, 762 n. 5 (BIA 2016). The USCIS adjudicates the exemption for aliens with final orders of removal who are otherwise eligible for the relief sought. *See* USCIS Fact Sheet, "Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal" (Oct. 23, 2008) (hereinafter "USCIS Fact Sheet"). Therefore, in TRIG cases, Immigration Judges and the Board must decide whether an alien is otherwise eligible for the immigration benefit sought. *See* Chairman's Memo (BIA 14-04), "Process for Cases Involving Terrorist-Related Exemptions," (Nov. 10, 2014) (hereinafter "Chairman's Memo (BIA 14-04)").

A. The USCIS Process in General

Aliens who are inadmissible under the terrorism-related grounds may be eligible for a TRIG exemption under section 212(d)(3)(B) of the Act. Those exemptions are made by the Secretaries of State and Homeland Security. New exemptions are authorized on an ongoing basis. The Secretaries have granted

group-based exemptions and situational exemptions. A full list of the current situational and group-based exemptions is available online at https://www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissibility-grounds-exemptions.

The statute precludes the Secretaries from granting exemptions to the following: aliens engaged in or who after entry are likely to engage in terrorist activity; aliens who are members or representatives of, have voluntarily and knowingly engaged in (or endorsed or espoused or persuaded others to endorse or espouse or support) "terrorist activity" on behalf of, or have voluntarily and knowingly received military-type training from a Tier I or II terrorist organization; groups that have engaged in terrorist activities against the United States or another democratic country or groups that purposefully engage in terrorist activity directed at civilians. Section 212(d)(3)(B) of the Act. Additionally, an exemption may not be granted to an alien subject to pending removal proceedings. *Id.*

Once the Secretaries have exercised their authority under section 212(d)(3)(B) of the Act, USCIS considers whether the alien is eligible for the exemption. The USCIS decides whether an exemption should be granted in the exercise of discretion based on a totality of the circumstances. The alien must meet certain threshold requirements to be considered for an exemption: the alien must be otherwise eligible for the immigration benefit or protection sought; must undergo and pass all relevant background checks; must fully disclose to the best of his or her knowledge in all relevant applications and/or interviews with U.S. government officials, the nature and circumstances of any terrorism-related activity or associations and any contact with terrorist organizations; establish that he or she has not participated in, or knowingly provided material support to terrorist activities that target U.S. interests or noncombatants; and establish that he or she does not pose a danger to the safety and security of the U.S. *See, e.g.*, USCIS Policy Memorandum, Implementation of the Discretionary Exemption Authority.

B. Cases with Administratively Final Orders of Removal

Since September 2008, the DHS has exercised the exemption authority under section 212(d)(3)(B)(i) of the Act, for those cases (detained or not) with a final removal order entered on or after September 8, 2008. *See* USCIS Fact Sheet. For non-detained cases, the ICE Office of Chief Counsel handling the case will forward the case to USCIS for exemption consideration if relief was denied *solely* on the basis of one of the grounds of inadmissibility for which an exemption currently exists. *Id.* A Notice of Referral will be mailed to the alien and his or her attorney, but no further action is required by the alien to obtain the exemption. *Id.* For detained cases, ICE will inform the alien directly and provide a Form I-246 (Application for a Stay of Deportation or Removal). *Id.* The USCIS decision on whether to grant the exemption is final and unreviewable. *See id.*; *see also* section 212(d)(3)(B) of the Act. If the exemption is granted, ICE and the applicant in proceedings will file a joint motion to reopen with the Board or the Immigration Judge. *See* USCIS Fact Sheet. Previously, cases where an exemption was not yet available but was expected to become available were placed on hold according to the then-governing USCIS hold policy. As of October 19, 2017, cases for which no exemption(s) is currently available will not be placed on hold absent direction from a component's TRIG point of contact. *See* USCIS Policy Memorandum (PM-602-0150), "Revised Guidance for Processing Cases Subject to Terrorism-Related Inadmissibility Grounds and Rescission of the Prior Hold Policy for Such Cases" (Oct. 19, 2017).

Although exemptions are granted solely by the USCIS, the record of proceeding developed in removal proceedings plays an important role in those determinations. First, as a general rule, the parties should be given the opportunity in Immigration Court to question the respondent regarding his or her eligibility for an exemption and to litigate the merits of the application for admission or relief, regardless of the terrorism bar. As stated above, because an exemption is only available to aliens who would otherwise have been eligible for the relief sought, the Board and the Immigration Judge should indicate whether a respondent would merit the requested relief "but for" the terrorism bar. *See* Chairman's Memo (BIA 14-04); Memorandum from Brian O'Leary, Chief Immigration Judge, Process for Handling Cases Involving a Terrorism Bar (April 21, 2015).

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

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I,_____, certify that I have reviewed, in its entirety, the video presentation entitled, **Terrorism-Related Grounds of Inadmissibility**, sponsored by the Board of Immigration Appeals Training & Development Program.

Signature: _____

Date: _____

Alien Smuggling: Grounds of Inadmissibility and Deportability

Sections 212(a)(6)(E) and 237(a)(1)(E) of the Act

A. Alien Smuggling Provisions

1. Inadmissibility: "Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible." Section 212(a)(6)(E)(i) of the Act.

2. Deportability: "Any alien who (prior to the date of entry, at the time of any entry, or within five years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable." Section 237(a)(1)(E)(i) of the Act.

3. Each ground has a special rule/exception in the case of family reunification, as well as a waiver. *See* sections 212(a)(6)(E)(ii) & (iii) of the Act; sections 237(a)(1)(E)(ii) & (iii) of the Act.

B. Burden of Proof and Standard of Proof

1. Deportability: DHS must establish by clear and convincing evidence that alien took actions that amount to knowingly encouraging, inducing, assisting, abetting, or aiding any other alien's unlawful entry into the United States. Section 240(c)(3)(A) of the Act; *see Perez-Arceo v. Lynch*, 821 F.3d 1178, 1183 (9th Cir. 2016); *Woodby v. INS*, 385 U.S. 276, 286 (1966).

2. Inadmissibility: Alien must establish he or she did not knowingly encourage, induce, assist, abet, or aid any other alien to unlawfully enter or try to enter the United States.
   a. Arriving aliens: An applicant for admission bears the burden of proving that he or she is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212 of the Act; or by clear and convincing evidence that he or she is lawfully present in the U.S. pursuant to a prior admission. Section 240(c)(2)(A) of the Act; *see Altamirano v. Gonzales*, 427 F.3d 586, 590 (9th Cir. 2005).
   b. LPRs: Generally, an alien who is an LPR returning from abroad is not regarded as an applicant for admission. Section 101(a)(13)(C) of the Act. But a returning LPR who has engaged in illegal activity after having departed U.S. is deemed to be an applicant for admission and thus charged under section 212 of the Act, instead of section 237 of the Act. *See* section 101(a)(13)(C)(i)-(vi) of the Act; *see also Guerrero v. Att'y Gen. of U.S.*, 515 F. App'x 146 (3d Cir. 2013) (persuasive authority).

C. Establishing an Alien Smuggling Allegation: Elements

(1) **Knowingly** has
(2) **Encouraged, induced, assisted, abetted or aided** any other alien
(3) **To enter or to try to enter** the United States in violation of law

Is inadmissible/deportable. *See Dimova v. Holder*, 783 F.3d 30 (1st Cir. 2015).

D. Entry: What constitutes an "entry?"[1]

1. An "entry" requires:
   (1) A crossing into the territorial limits of the United States, i.e., physical presence;
   (2) (a) an inspection and admission by an immigration officer, or
   (b) an actual and intentional evasion of inspection at the nearest inspection point; and
   (3) freedom from official restraint.

   Matter of Martinez-Serrano, 25 I&N Dec. 151, 153 (BIA 2009) (citing *Matter of Z-*, 20 I&N Dec. 707, 708 (BIA 1993)); *see Dimova v. Holder*, 783 F.3d at 38 (deferring to the Board's interpretation of the term "entry" but declining to announce any bright-line rule or definitive definition of "entry").[2]

2. An "entry" may include: other related acts that occurred either before, during, or after a border crossing, so long as those acts are in furtherance of, and may be considered to be part of, the act of securing and accomplishing the entry.

   Matter of Martinez-Serrano, 25 I&N Dec. at 154; *see Dimova v. Holder*, 783 F.3d at 38 (agreeing with the Ninth Circuit in *United States v. Gonzalez-Torres*, 309 F.3d 594, 598 (9th Cir. 2002), that entry into the United States "requires more than mere physical presence within the country" and that "an alien must cross the United States border free from official restraint" to "enter" the country); *see also Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 748 (9th Cir. 2007) (stating that section 212(a)(6)(E)(i) of the Act "does not describe acts that constitute static or instantaneous occurrences," but rather describes "acts that occur over a period of time and distance, and … not … at one particular moment or location").

3. "Try to enter": Mere preparation to bring other aliens into the United States is not enough to constitute attempted entry. *See Juarez-Mendez v. Holder*, 377 F. App'x 645 (9th Cir. 2010) (concluding that the petitioner did not aid and abet attempted alien smuggling because no "attempt" had been committed where the petitioner had engaged in preparations to bring children across the border, their parents had not yet decided how they would effect a crossing, and the aliens' plan to illegally enter the United States was thwarted before they made an attempt to enter).

E. Mens Rea: "Knowingly"

1. Plain language of the statute: An alien who knows that another alien has crossed the border illegally and provides some sort of affirmative act of assistance that makes it easier for the illegal alien to avoid apprehension at the border. *See Dimova v.* Holder, 783 F.3d at 41-42 (noting that, notwithstanding alien's motivation in assisting out of humanitarian concern, the statute requires nothing more than a knowing act of assistance to attempted illegal entry into U.S. to render alien removable); *see also Guerrero v. Att'y Gen. of U.S.*, 515 F. App'x at 150 (persuasive authority) (noting that actual knowledge is required).

2. An "obvious pattern of [assistance]" can help establish mens rea: *Ramos v. Holder*, 660 F.3d 200, 204, 206 (4th Cir. 2011) (determining that "a nearly-identical arrival process provides considerable reason to infer that at least by the time [respondents] received their second, third, and fourth calls from Mexico asking for money, they knew the money would be used to pay for illegal passage to the United States"); *see also Sanchez-Marquez v. U.S. INS*, 725 F.3d 61, 63 (7th Cir. 1984) (per curiam) (determining there was sufficient circumstantial evidence to establish that petitioner acted knowingly in assisting seven aliens in crossing the border illegally).

3. A mistaken belief that an alien was entitled to enter the U.S. legally would be a defense to ineligibility for an alleged smuggler. *See Tapucu v. Gonzales*, 399 F.3d 736, 739 (6th Cir. 2005) (citing 9 U.S. Department of State Foreign Affairs Manual § 40.65 n.4 (1995) in interpreting "knowingly" in section 212(a)(6)(E) of the Act); *cf. Chambers v. Office of Chief Counsel*, 494 F.3d 274, 278-79 (2d. Cir. 2007) (noting that nature of respondent's false statements at border about smuggled alien's residency in the U.S. supported inference drawn by IJ and Board that respondent knew that alien could not legally enter the U.S., despite respondent's contention that her behavior was consistent with acts of someone who thought she was participating in a legal act).

F. Act of assistance[3]

1. **When has an alien "assisted, abetted, or aided" an entry?**
   a. **"Bright-line test"[4]: Affirmative act of assistance required – 1C, 6C, 9C**
      i. Sixth Circuit: Act must be "compensable" and "illicit" – *Tapucu v. Gonzales*, 399 F.3d at 739 (holding that alien did not violate anti-smuggling of aliens statute and noting that even though "for gain" requirement was eliminated, the "provision still requires an affirmative and illicit act of assistance" and that "the statute still requires the would-be smuggler to commit a compensable act

– to do something for which remuneration reasonably *could* be made even if it need not be proved").

- (Scenario: LPR driver of car with passenger [who had been residing unlawfully in the U.S. for a number of years] knew passenger had been living illegally in the U.S. but believed alien was lawfully permitted to enter the U.S. because of pending green card application)

ii. Ninth Circuit: Mere presence at scene of illegal entry and knowledge of the entry is not enough – *Altamirano v. Gonzales*, 427 F.3d 586 (9th Cir. 2005) (agreeing with the Sixth Circuit's reasoning of affirmative act but not explicitly adopting its holding that act must be "compensable")

- (Scenario: Woman traveling into the U.S. in car driven by others, with knowledge that alien was being smuggled in the trunk, did not encourage, induce, assist, abet, or aid the unlawful entry under section 212(a)(6)(E) of the Act)
- The Ninth Circuit made its conclusion by looking to the "well-established meaning of aiding and abetting" in criminal law, noting, inter alia, that "[a] defendant cannot be convicted of aiding and abetting absent an affirmative act of assistance in the commission of the crime." *Id.* at 594-95 (collecting cases).

iii. The First Circuit agreed with the Ninth Circuit that "the plain meaning of this statutory provision requires an affirmative act of help, assistance, or encouragement" for an alien to have engaged in alien smuggling – *Dimova v. Holder*, 783 F.3d at 40 (but staying silent on whether act must be "compensable").

iv. **BUT**: Alien who acquiesced in use of her children's birth certificates in a smuggling attempt and was present in the car during the attempt, where nothing in the record established that alien physically handed over the birth certificates **did not make an affirmative act**. *Aguilar Gonzalez v. Mukasey*, 534 F.3d 1204 (9th Cir. 2008). Note: Dissent in *Aguilar Gonzalez* stated that alien's reaction to request for birth certificates was "explicit permission" rather than "reluctant acquiescence" and concluded positive agreement constituted affirmative act. *Id.* at 1209-10.

v. Also, mere transportation of an alien within the United States **does not constitute an affirmative act**. The Third Circuit has determined that an alien whose conduct was "strictly limited to picking up the aliens once they had already crossed the border and transporting them from one area in the United States to another" was not inadmissible under section 212(a)(6)(E)(i) of the Act. *Parra-Rojas v. Att'y Gen. of U.S.*, 747 F.3d 164, 171 & n.9 (3d Cir. 2014) (holding that "record is clear that Petitioner had no involvement with the aliens prior to their entry into the United States, did not provide any

assistance, financial or otherwise, in their entry, and did not commit any other "affirmative act" . . . as required by [section 212(a)(6)(E)(i)]).

b. **No "bright-line test" as to whether actions are sufficient to prove alien encouraged, induced, assisted, abetted, or aided in smuggling in violation of section 212(a)(6)(E) of the Act – 2C, 4C, 8C[5]**

i. Second Circuit: *Chambers v. Office of Chief Counsel*, 494 F.3d at 279 (contrasting behavior of alien with that of aliens in *Tapucu* and *Altamirano* in that alien "personally arranged to provide transportation for [the smuggled alien] into U.S. and purposefully deceived customs officials at time of his attempted entry").

ii. Fourth Circuit: "Affirmative act of assistance may suffice": *Ramos v. Holder*, 660 F.3d at 205 & n.3 (noting also that respondents' reliance on *Tapucu* is misplaced and declining to add "limitations absent from the words of the statute," including a requirement that acts in the alien smuggling statute involve the "'commission of a compensable act' or an 'illicit' act").

iii. *Sandoval-Loffredo v. Gonzales*, 414 F.3d 892 (8th Cir. 2005) (holding that individual who drove his brother to U.S.-Canadian border and falsely claimed that his brother was a USC was inadmissible under section 212(a)(6)(E)(i) of the Act because IJ concluded that individual did in fact attempt to assist his brother by making false claim at border).

iv. U.S. Department of State believes that this [statutory provision] includes bringing in a minor child (as a minor child is not excused from this violation for lack of legal capacity). Letter, Odom, Chief Advisory Opinions, Visa Services (Oct. 20, 1993), *reprinted in 71 No. 10 Interpreter Releases* 352, 375-78 (Mar. 14, 1994).

2. **When has an alien "encouraged" or "induced" another alien to enter illegally?[6]**

a. *Sanchez-Marquez v. U.S. INS*, 725 F.2d at 63 (holding that alien who promised other aliens whom he met in Mexico that he would drive them from Texas border to Chicago if they met him on the American side of the border could "certainly be construed as having 'encouraged' or 'induced' [them] to cross the border illegally" and was deportable under section 241(a)(13) of the Act).

b. The Ninth Circuit has noted the U.S. Department of State's Foreign Affairs Manual's interpretation of such ineligible actions under section 212(a)(6)(E)(i) of the Act. *See Altamirano v. Gonzales*, 427 F.3d at 593 n. 6 ("They could be as little as offering an alien a job under circumstances where it is clear that the alien will not enter the United States legally in order to accept the employment (encourage and induce), or they might actually involve physically bringing an alien into the United States illegally (aid and assist).").

c. The First Circuit has apparently differentiated between "encourag[ing]" or "induc[ing]" a physical crossing and mere assistance, or aiding or abetting, an attempted entry. *See Dimova v. Holder,* 783 F.3d at 40 (stating that alien need not have "encouraged" or "induced" [aliens] to cross the border to be removable but "*only* have 'assisted, abetted, or aided' [aliens'] attempted illegal entry") (emphasis added).

3. **Ambit of the Statute: How long after entry can the assistance be related back to the entry itself?**[7]
   a. An alien may be removable in certain situations for transporting or harboring another alien within the U.S. after the fact of smuggling into the U.S.
      i. **"Bright-line" rule – 9C**[8]**:** Liability exists only until initial transporter stops transporting alien: *Urzua Covarrubias v. Gonzales*, 487 F.3d at 747 (finding alien may be liable for assisting smuggling effort "until initial transporter who brings alien to U.S. ceases to transport alien"); *see also Matter of I-M-*, 7 I&N Dec. 389, 390-91 (BIA 1957) (concluding that respondent who transported several aliens did not aid or abet their illegal entries where the respondent did not provide transportation until days or weeks after each individual physically entered U.S.); *cf. Soriano v. Gonzales*, 484 F.3d 318, 321 (5th Cir. 2007) (holding act of transporting aliens near border in truck within a few hours after initial entry may be sufficient evidence that prearranged plan was in effect); *Matter of Martinez-Serrano*, 25 I&N Dec. at 153 (finding that alien who harbored illegal aliens after their entry is removable so long as her conduct was tied to smuggled aliens' manner of entry).

4. **What if alien did not actually participate in the physical crossing?**
   a. BIA: *Matter of Martinez-Serrano*, 25 I&N Dec. at 152-155 (noting that direct participation on the physical border crossing is not required); *Matter of Vargas-Banuelos*, 13 I&N Dec. 810 (BIA 1971).
   b. Circuit courts of appeals:
      i. *Dimova v. Holder*, 783 F.3d at 30 (agreeing with Fifth Circuit and Seventh Circuit that person assisting in smuggling need not be physically present at the time or place of illegal crossing to be charged with assistance); *Ramos v. Holder*, 660 F.3d at 205 (noting that physical presence at the border is not a necessary condition to satisfy section 212(a)(6)(E) of the Act); c*f. Parra-Rojas*, 747 F.3d at 170 (stating that where petitioner did not know aliens before entering the U.S. and where illegal crossings took place "several days" before petitioner picked them up, did not violate alien smuggling provision)
      ii. *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 678-83 (9th Cir. 2005) (noting that smuggling deportability ground under section 237(a)(1)(E)(i) of the Act not limited solely to persons who participate in physical border

crossing and that the provision that makes smuggling a deportable offense does not cover mere transportation or harboring of aliens within the United States); "An individual may knowingly encourage, induce, assist, abet, or aid with illegal entry, even if he did not personally hire the smuggler and even if he is not present at the point of illegal entry." *Id.* at 679; *Soriano v. Gonzales,* 484 F.3d at 318 (noting that alien seeking admission to U.S. who participates in scheme to aid other aliens in illegal entry is inadmissible regardless of whether assisting individual was present at border crossing)

5. **A criminal conviction is not determinative and an Immigration Judge can consider the underlying conduct of an alien's conviction for purposes of determining removability for alien smuggling**
   a. *Matter of Martinez-Serrano*, 25 I&N Dec. at 155 (holding that an alien's conviction under 18 U.S.C. § 2(a) and 8 U.S.C. § 1325(a)(2) for aiding and abetting another alien to enter the U.S. in violation of the law establishes that the convicted alien is removable under section 237(a)(1)(E)(i) of the Act, and because removability under section 237(a)(1)(E)(i) does not require a conviction, can look to facts underlying the conviction to demonstrate that alien knowingly assisted other aliens to enter the U.S. in violation of the law)
   b. *Santos-Sanchez v. Holder*, 744 F.3d 391 (5th Cir. 2014) (noting *Martinez-Serrano* and holding that regardless of whether every violation of 8 U.S.C. § 1325(a) automatically establishes removability under section 237(a)(1)(E)(i), the respondent is removable as the particular conduct described in his conviction documents establish his removability under section 237(a)(1)(E)(i) of the Act)
   c. *Parra-Rojas*, 747 F.3d at 168-69 (noting alien need not be charged with or convicted of any criminal offense in order to be deemed inadmissible under smuggling bar); *see also Guerrero v. Att'y Gen. of U.S.*, 515 F. App'x 146 (3d Cir. 2013); *Alonso Fernandez v. Holder*, 422 F. App'x 341 (5th Cir. 2011).

G. When does the statutory waiver for alien smuggling apply?

1. Inadmissibility: A waiver under section 212(a)(6)(E)(iii) of the Act cross-references section 212(d)(11) of the Act (the actual provision authorizing waiver); this limited waiver (AG discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest) is available for LPRs and applicants for an immigrant visa, who assisted spouse, parent, son or daughter (and no other individual) to enter the U.S. in violation of law.
   a. *Matter of Compean*, 21 I&N Dec. 51 (BIA 1995) (sustaining INS appeal as to IJ granting section 212(d)(11) waiver of excludability to applicant).
   b. Waiver is available for LPRs returning from abroad and to persons who are seeking admission as IR or under sections 203(a)(1)-(3) of the Act.
   c. But the Ninth Circuit has held that waiver may not be applied to overcome GMC bar under INA § 101(f)(3). *See Sanchez v. Holder*, 560 F.3d 1028 (9th

Cir. 2009); *see also Velazquez-Macedo v. U.S. Atty. Gen.*, 535 F. App'x 806, 808-09 (11th Cir. 2013) (upholding the Board's decision, in an unpublished opinion, that alien was not eligible for family-unity waiver as he was not an LPR and was not seeking admission or adjustment of status as an IR).

2. Deportability: section 237(a)(1)(E)(iii) of the Act – **"at the time of the smuggling"**
   a. *Matter of Farias*, 21 I&N Dec. 269, 271-75 (BIA 1996, 1997; A.G. 1997) (noting that waiver of alien smuggling deportability ground under section 241 of the Act is available to LPRs who aided and abetted the unlawful entry of only their spouse, parent, son or daughter and if familial relationship arose after smuggling but existed at time of application for relief); *cf. Perez-Oropeza v. INS*, 56 F.3d 43 (9th Cir. 1995) (waiver unavailable for assisting siblings or other family members (or those who later become family members))
   b. But IIRIRA § 351 overrode *Matter of Farias* by amending statute (and section 212(d)(11) of the Act) clarifying that familial relationship must have existed at the time of the unlawful entry in order for waiver to apply to section 241(a)(13) ground. *See Matter of Farias*, 21 I&N Dec. 269, 281-82 (BIA 1996, 1997; A.G. 1997); *See* Pub. L. No. 104-208, 110 Stat. 3009 (enacted Sept. 30, 1996).

H. When does the special rule/exception to inadmissibility or deportability apply?

1. Inadmissibility: Ground of inadmissibility does not apply to applicant seeking permanent residency as an IR or under second preference family-based visa category, who qualified for family unity under IMMACT90 § 301(b)(1), who was physically present in U.S. on May 5, 1988, and who assisted her spouse, parent, son or daughter (and no other individual) to enter the U.S. in violation of law. Section 212(a)(6)(E)(ii) of the Act.

2. Deportability: Ground of deportability shall not apply to an alien who is an "eligible immigrant" (as defined in section 301(b)(1) of IMMACT90), who was physically present in U.S. on May 5, 1988, and who is seeking admission as an immediate relative or a spouse of unmarried son or daughter of LPR, if the alien assisted or abetted only their spouse, parent, or child in entering the US unlawfully and this occurred prior to May 5, 1988. Section § 237(a)(1)(E)(ii) of the Act.

I. History of the Statutory Provisions

1. Alien smuggling has long been a ground of exclusion or deportability. Prior versions of the statutes are substantially similar to the current versions, except that the

smuggling had to be "for gain." *See Matter of R-D-*, 2 I&N Dec. 758 (A.G. 1947); *see also* former section 212(a)(31) of the Act, 8 U.S.C. § 1182(a)(31) & former section 241(a)(13) of the Act, 8 U.S.C. § 1251(a)(13).

2. "For gain" requirement
   a. Excludable and deportable aliens: "Any alien who at any time shall have, knowingly *and for gain*, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law" (emphasis added). *See Matter of Compean*, 21 I&N Dec. at 52 n. 1 (BIA 1995); *Matter of Vargas-Banuelos,* 13 I&N Dec. at 812 (noting DHS had to establish element of gain by clear, convincing, and unequivocal evidence).
   b. "Actual receipt of money [was] not necessary," but an "agreement to pay later constitutes gain, or anticipated gain," and brought alien within the ambit of section 241(a)(13) of the Act. *Sanchez-Marquez v. INS*, 725 F.3d at 63 (citing *Matter of P.G.,* 7 I&N Dec. 514, 516 (1957))
   c. "For gain" requirement removed with enactment of IMMACT90. Pub. L. No. 101-649, 104 Stat. 4978, 5073-74, 5078 (Nov. 29, 1990). *See Altamirano v. Gonzales*, 427 F.3d at 592 n.5. However, other elements of the statutes remained the same. In addition, section 601 of IMMACT90 added a special waiver under section 212(d)(11), 8 U.S.C. § 1182(d)(11).
   d. Congress revised smuggling provision in 1990 because the previous section's requirement that the assistance be "for gain" had "created difficult proof problems" in certain situations, such as where payment had not yet been tendered. *See Tapucu v. Gonzales*, 399 F.3d at 740. This change in smuggling provision led courts to address for the first time when someone has knowingly "assisted" an entry.

3. Section 307(d) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991
   a. Amended section 212(d)(11). *See Matter of Compean*, 21 I&N Dec. at 53.
   b. Added the "family-unity waiver" under section 237(a)(1)(E)(ii).

4. Executive Order 13767: Border Security and Immigration Enforcement Improvements (Jan. 25, 2017)
   a. Puts into place accountability measures to protect alien children and prevent exploitation against smuggling
   b. Secretary Kelly DHS Memo: Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017)
      i. ICE and CBP are to ensure the proper enforcement of U.S. immigration laws against any individual who – directly or indirectly – facilitates the illegal smuggling or trafficking of an alien child into the United States.

ii. To counter threat by criminal organizations, government task forces are directed to plan and implement counter-network ops directed at disrupting transnational criminal organizations, focused on those involved in human smuggling.
iii. Results of EO: Secretary Kelly released a statement on May 8, 2017, that there has been an "increase in the fees charged by human smugglers along U.S. southwest border" and attributes the increase to changes in U.S. policy.

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[1] Although the plain language of the statute (and *Dimova v. Holder*, 783 F.3d 30, 36 (1st Cir. 2015)) lays out the elements as described in Section C of this outline in such an order, for purposes of convenience, this outline will first discuss "entry" or attempted entry.

[2] In *Dimova v. Holder*, *supra*, at 38-40, the First Circuit determined that the facts did not show that the alien family had not completed its "entry" when the respondent picked them up in a remote wooded area in the United States within a matter of hours after their physical crossing from Canada).

[3] "Congress intended the civil alien smuggling statute to apply to a broad range of conduct." *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 748 (9th Cir. 2007) (citing *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir 2005)).

[4] Sarah Cade, *Removability for Smuggling Under Sections 212(a)(6)(E) and 237(a)(1)(E) of the Immigration and Nationality Act*, 4 (No. 3) IMM. L. ADVISOR (March 2010), at 2-3, 13.

[5] *See, e.g., id.* at 13.

[6] *See id.* at 13-14.

[7] *Id.* at 14.

[8] *Id.*

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Training

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

I,_____, certify that I have reviewed, in its entirety, the video presentation entitled, **Alien Smuggling Grounds of in Admissibility**, sponsored by the Board of Immigration Appeals Training & Development Program.

Signature: _____

Date: _____

Learning Objectives

- Identify who faces expedited removal
- Describe how the process works
- Distinguish credible fear and reasonable fear interviews and reviews
- Appreciate how cases may move from this process to your desk -- and beyond!

To whom does expedited removal apply?

- Those who are applying for admission at a US port of entry but without valid unexpired documents: INA § 212(a)(7)(A)(i)(I)
- Those who were admitted or paroled, or who are trying to be admitted, but with fraudulent documents: INA § 212(a)(6)(C)
- Those who have achieved physical entry but have done so without admission or parole: INA § 212(a)(6)(A)(i).

To whom does expedited removal apply?

And one other category not technically subject to expedited removal but whose process amounts to the same thing:

- Those who have been previously removed and are subject to reinstatement of removal. See INA § 241(a)(5)

To Review: whom does expedited removal apply?

- Those without documents
- Those with bad documents
- Those who slipped through without being admitted
- Those subject to reinstatement

Interview Process: 8 C.F.R. § 235.3(b)(2)(i): CBP must

- Inform the alien about his or her right to apply for asylum (READ Form I-867A)
- Create a record of the facts and statements made by the alien;
- Read the statement containing these facts to the alien;
- Explain the inadmissibility charges; and
- Give the alien a chance to respond in a sworn statement on Form I-867B.

Limits to applying the expedited removal process under the Statute

Aliens admitted with fraudulent documents or who evaded inspection are only subject to expedited removal if they cannot show the CBP officer that they've been in the United States for at least two years.

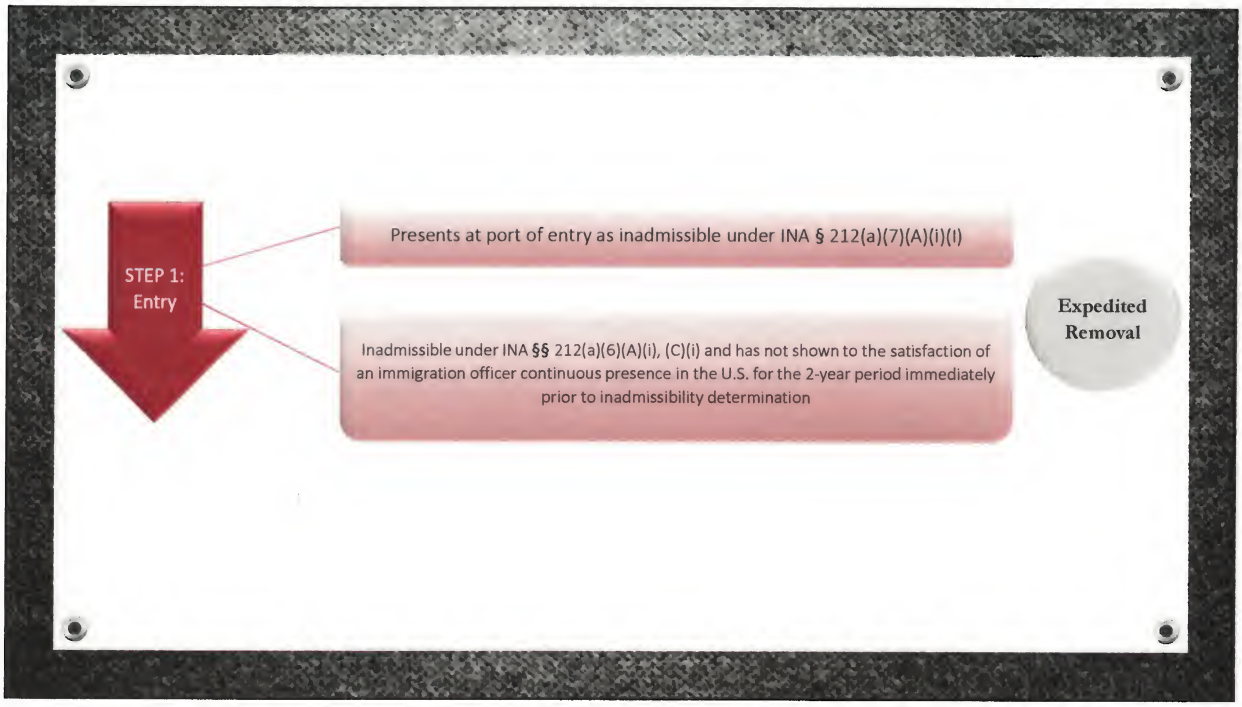
But...

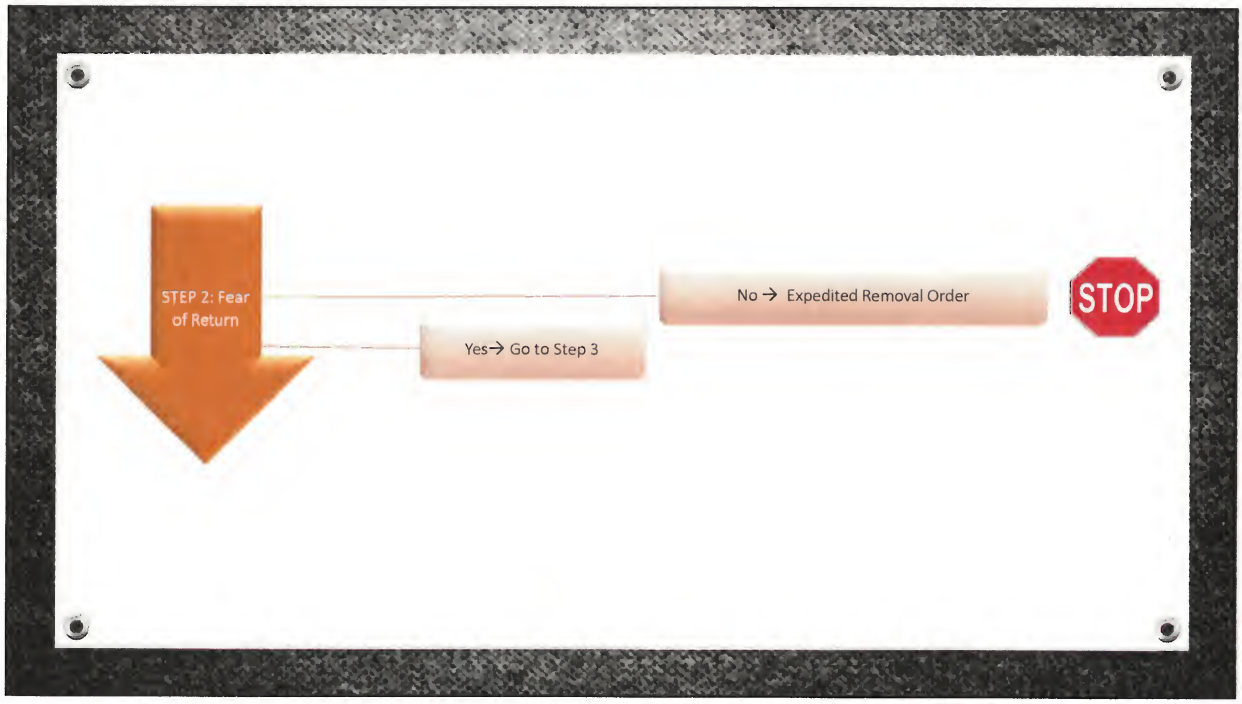
Under DHS Regulations

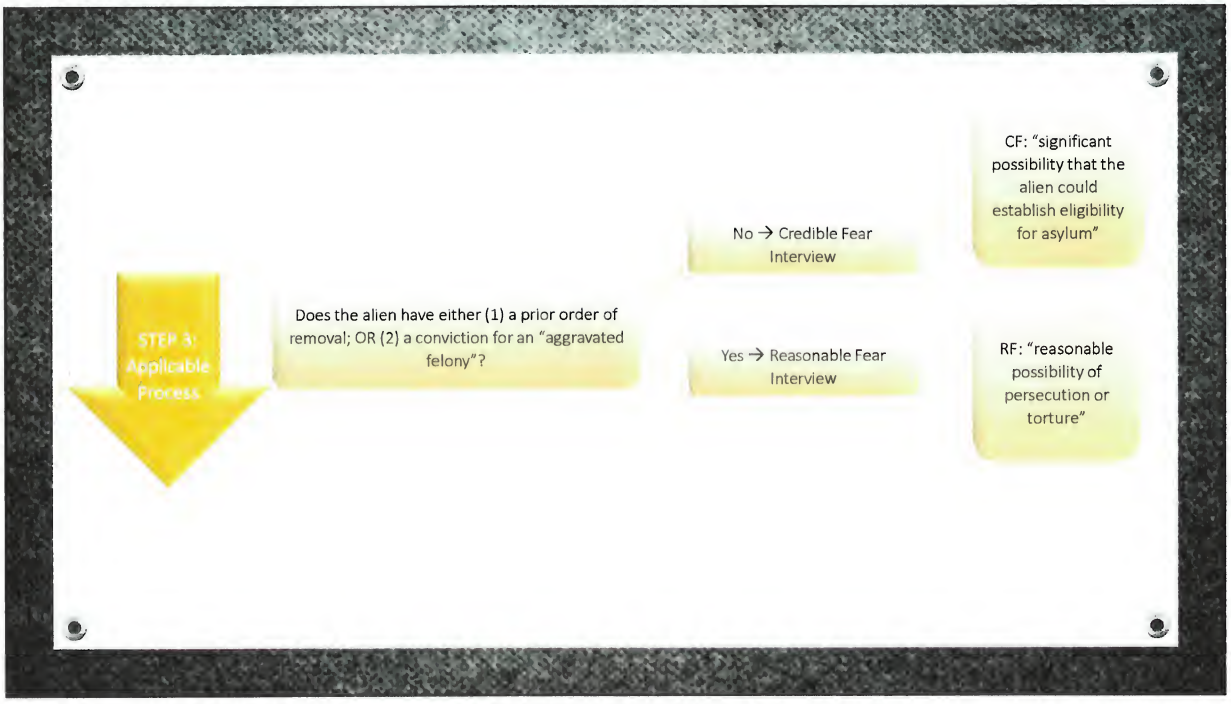
Aliens admitted with fraudulent documents or who evaded inspection are only subject to expedited removal if they are apprehended within 100 miles of the border and have been in the United States 14 days or less.

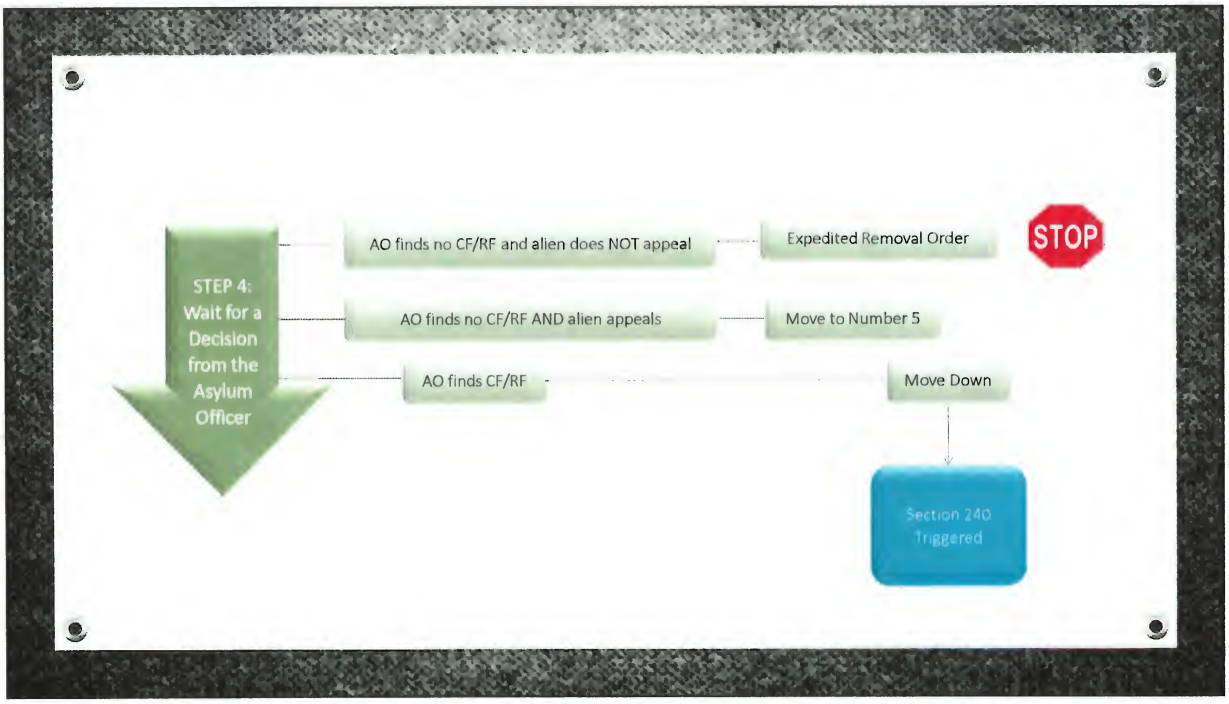
Immigration Judge involvement in expedited removal

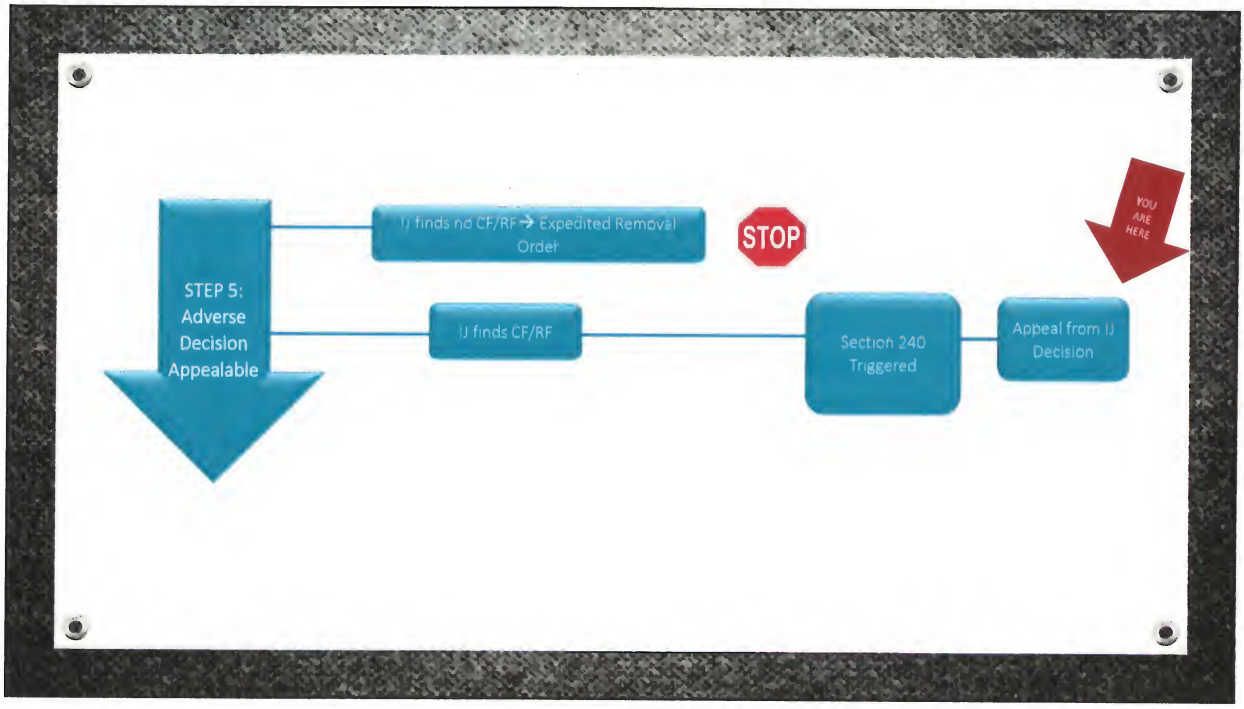
Interview (DHS)	Type of Review Before IJ	Timeframe	Claims that May be Considered
Credible fear	**Credible Fear Review**	24 hours to 7 days	240 All relief from removal (Incl. Asylum, W/H, CAT)
Reasonable Fear	**Reasonable Fear Review**	10 days	Withholding of Removal and Protection under the CAT only

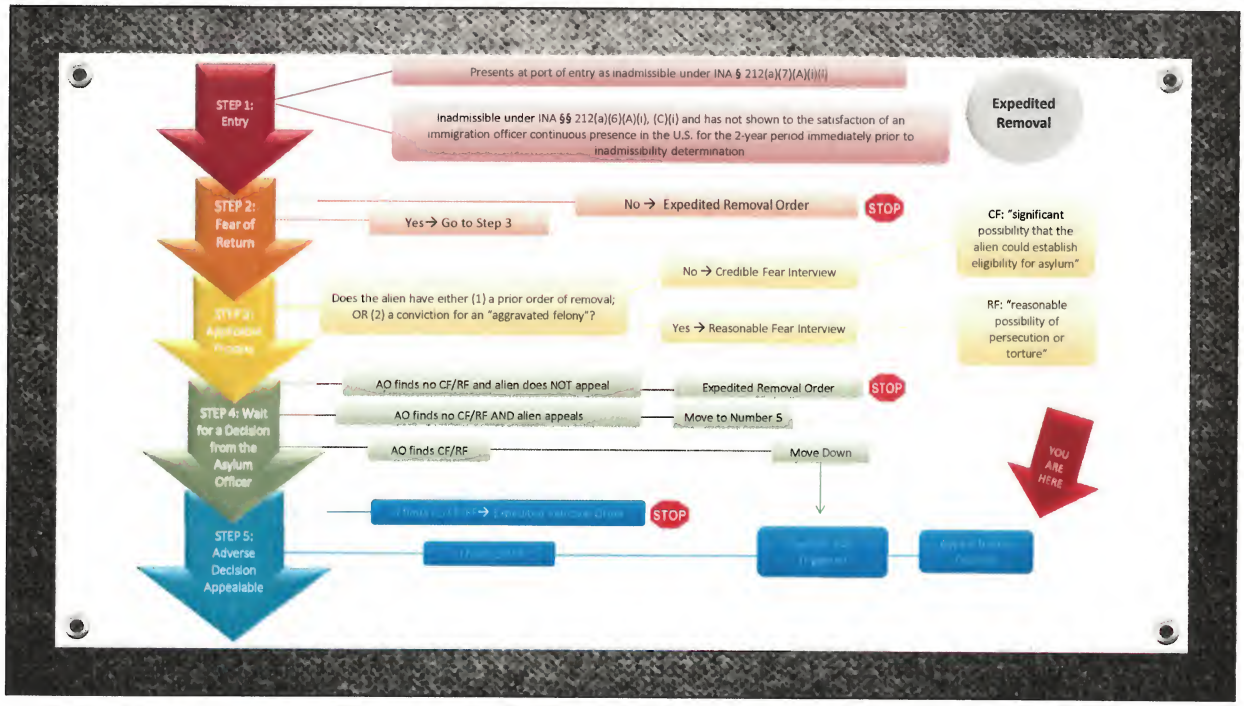

STEP 1: Entry
Presents at port of entry as inadmissible under INA § 212(a)(7)(A)(i)(I)
Inadmissible under INA §§ 212(a)(6)(A)(i), (C)(i) and has not shown to the satisfaction of an immigration officer continuous presence in the U.S. for the 2-year period immediately prior to inadmissibility determination
Expedited Removal


STEP 2: Fear of Return
No → Expedited Removal Order
STOP
Yes→ Go to Step 3


STEP 3: Applicable Process
Does the alien have either (1) a prior order of removal; OR (2) a conviction for an "aggravated felony"?
No → Credible Fear Interview
Yes → Reasonable Fear Interview
CF: "significant possibility that the alien could establish eligibility for asylum"
RF: "reasonable possibility of persecution or torture"


STEP 4: Wait for a Decision from the Asylum Officer
AO finds no CF/RF and alien does NOT appeal
Expedited Removal Order
STOP
AO finds no CF/RF AND alien appeals
Move to Number 5
AO finds CF/RF
Move Down
Section 240 Triggered


STEP 5: Adverse Decision Appealable
IJ finds no CF/RF → Expedited Removal Order
STOP
IJ finds CF/RF
Section 240 Triggered
Appeal from IJ Decision
YOU ARE HERE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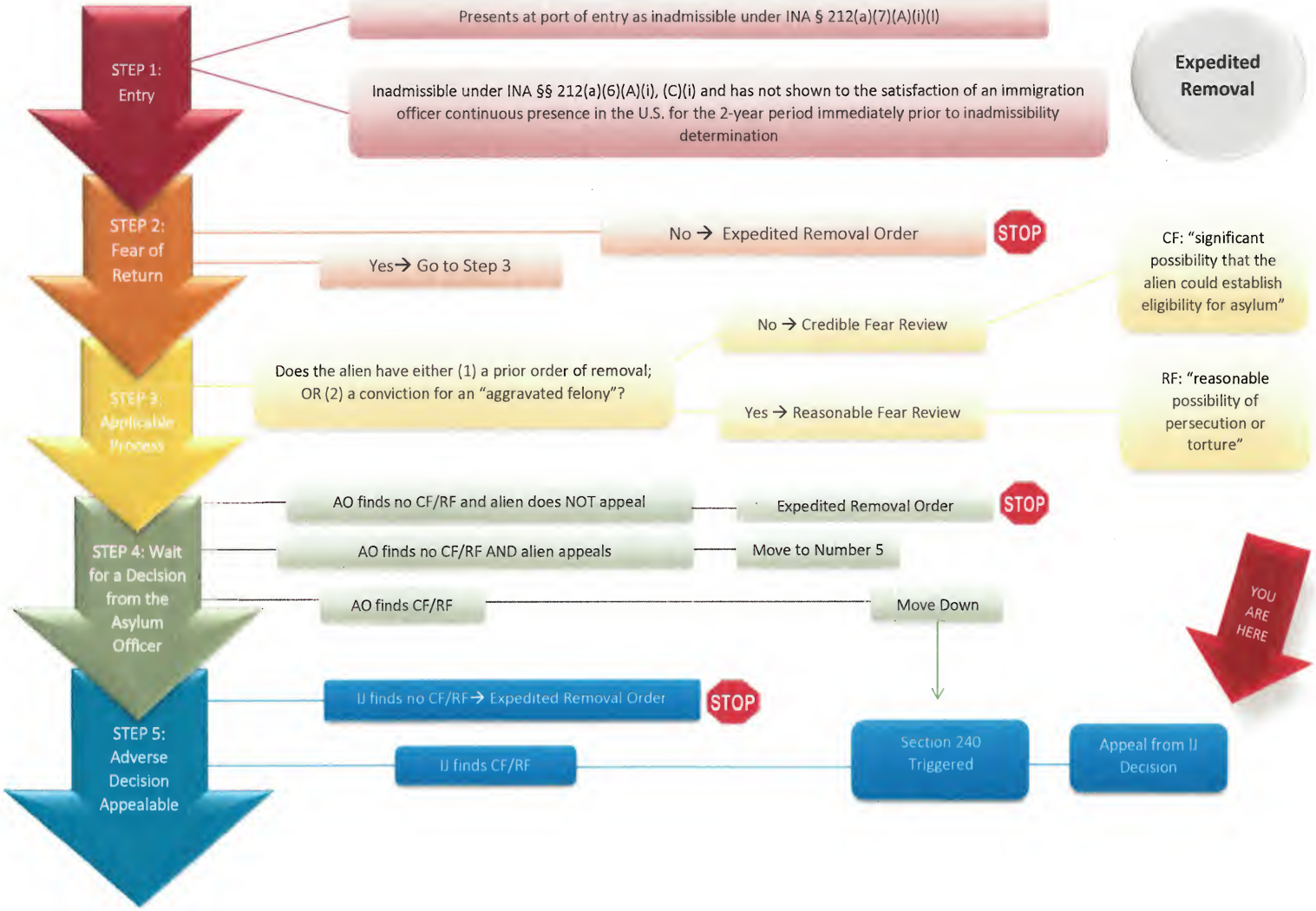
Presents at port of entry as inadmissible under INA § 212(a)(7)(A)(i)(I)
Inadmissible under INA §§ 212(a)(6)(A)(i), (C)(i) and has not shown to the satisfaction of an immigration officer continuous presence in the U.S. for the 2-year period immediately prior to inadmissibility determination
Expedited Removal
STEP 2: Fear of Return
No → Expedited Removal Order
STOP
Yes→ Go to Step 3
CF: "significant possibility that the alien could establish eligibility for asylum"
No → Credible Fear Interview
Does the alien have either (1) a prior order of removal; OR (2) a conviction for an "aggravated felony"?
Yes → Reasonable Fear Interview
RF: "reasonable possibility of persecution or torture"
STEP 4: Wait for a Decision from the Asylum Officer
AO finds no CF/RF and alien does NOT appeal
Expedited Removal Order
STOP
AO finds no CF/RF AND alien appeals
Move to Number 5
AO finds CF/RF
Move Down
YOU ARE HERE
STOP
STEP 5: Adverse Decision Appealable


STEP 1: Entry
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Inadmissible under INA §§ 212(a)(6)(A)(i), (C)(i) and has not shown to the satisfaction of an immigration officer continuous presence in the U.S. for the 2-year period immediately prior to inadmissibility determination
Expedited Removal
STEP 2: Fear of Return
No → Expedited Removal Order
STOP
Yes→ Go to Step 3
CF: "significant possibility that the alien could establish eligibility for asylum"
STEP 3: Applicable Process
Does the alien have either (1) a prior order of removal; OR (2) a conviction for an "aggravated felony"?
No → Credible Fear Review
Yes → Reasonable Fear Review
RF: "reasonable possibility of persecution or torture"
STEP 4: Wait for a Decision from the Asylum Officer
AO finds no CF/RF and alien does NOT appeal
Expedited Removal Order
STOP
AO finds no CF/RF AND alien appeals
Move to Number 5
AO finds CF/RF
Move Down
YOU ARE HERE
STEP 5: Adverse Decision Appealable
IJ finds no CF/RF→ Expedited Removal Order
STOP
IJ finds CF/RF
Section 240 Triggered
Appeal from IJ Decision

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Training

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Falls Church, Virginia 22041

I,_____, certify that I have reviewed, in its entirety, the video presentation entitled, **Understanding Expedited & Administrative Removal**, sponsored by the Board of Immigration Appeals Training & Development Program.

Signature: _____

Date: _____

QUICK REFERENCE GUIDE:
APPLYING THE CATEGORICAL/MODIFIED CATEGORICAL APPROACH

STEP ONE:

Determine the "elements" of the statute of conviction.

STEP TWO:

Compare the "elements" to the "generic" definition of the offense.

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Current as of 10.23.2017

STEP ONE:

Determine the "elements" of the statute of conviction
(as opposed to means).

- **"Elements"** are the things the State must prove (or a jury must find) beyond a reasonable doubt in order to sustain a conviction.

- **"Means"** or **"Brute Facts"** are the parts of the statute that are alternative ways of fulfilling the elements of the offense.

- **Determining the "Elements" of a Statute**

  The following are listed in the order in which they are best utilized. Case law and jury instructions should both be consulted, if possible.

  1. **Case Law**

     - **Westlaw** usually provides case law citations and blurbs regarding the "elements" of a statute in the **"notes" section** which may or may not provide the clear answer. (Remember to always look to the version of the statute that was in effect at the time of the conviction. In very rare cases, Westlaw will not have any "notes" to point you in the right direction, and it can be time-consuming research.).

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Example:

Kansas Statutes § 21-5413(b)(1)(B) (aggravated battery) prohibits: "knowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted."

- *Kansas case law shows that, in order to sustain a conviction, the State must prove beyond a reasonable doubt that the offender: "(1) knowingly caused bodily harm to another person, (2) in a manner whereby great bodily harm could be inflicted."*
- *Thus, these are the only two "elements" of the statute.*
- *Use of a "deadly weapon," "disfigurement," and "death" are "means" (or alternative ways) by which the harm may be inflicted.*

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2. **Jury Instructions**

A lot of States and jurisdictions have **pattern criminal jury instructions** that are publicly available on Westlaw or at the State Bar or State Court websites. Note, however, that not all jurisdictions provide jury instructions to the general public. In addition, jury instructions do not always lead to a clear result. But, jury instructions are generally the fastest and easiest way to determine the "elements" of a statute and should, where available, be consulted in conjunction with case law.

Example:

35 Pa. Cons. Stat. § 780-113(a)(30) prohibits: "[T]he manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance."

The jury instructions establish that "manufacture," "deliver," and "possession with intent to manufacture or deliver" are all "elements" of the offense rather than "means" because the State must prove one (or more) of them to sustain a conviction:

i. *In order to find a defendant guilty of manufacturing a controlled substance, the jury must find beyond a reasonable doubt that he ... manufactured the specific drug charged. See Pennsylvania Suggested Standard Criminal Jury Instructions section 16.30(a)(30)A (3d ed. 2016).*

ii. *In order to find a defendant guilty of delivering a controlled substance, the jury must find beyond a reasonable doubt that he delivered the drug charged. See id. at section 16.30(a)(30)B.*

iii. *In order to find a defendant guilty of possession with intent to deliver or manufacture a controlled substance, the jury must find beyond a reasonable doubt that he either "delivered the item to another" or "used the item in the manufactur[e] of a controlled substance." See id. at section 16.01.*

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3. **The Face of the Statute**

This really only comes into play when a statute lists **different punishments for different statutory alternatives (sentence enhancements)** because these by law must always be proven beyond a reasonable doubt. Generally, looking only at the face of a statute to determine the "elements" does not yield accurate results, but this method does assist when you see that an otherwise overbroad statute has different classes or punishments for different offenses.

Example:

Assault *under Arizona Revised Statutes section 13-1203(A)(1), "requires the proof that the defendant [Intentionally/knowingly/recklessly] caused physical injury to another person." See Rev. Ariz. Jury Instructions (Criminal), 12.03 (3d ed.).*

> *The jury is not required to unanimously agree on one of the specific mens rea beyond a reasonable doubt. See id. Thus, these are "means" and not "elements." However, in the Ninth Circuit, a reckless mens rea is insufficient for a crime of violence. Thus, subsection (A)(1) of the statute would appear to be "overbroad" and categorically not a crime of violence in the Ninth Circuit.*

However, subsection (B) of the statute provides different punishments for different alternatives. If the offense is committed "intentionally or knowingly," it is a Class 1 misdemeanor. If it is committed "recklessly," it is a Class 2 misdemeanor.

- *Thus, if the conviction is a Class 1 misdemeanor, "intentionally or knowingly" are "elements" of the offense and it may be a crime of violence.*
- *If the conviction is a Class 2 misdemeanor, "recklessly" is an "element" of the offense and it is not a crime of violence.*

Note: The fact that the State need not prove the exact mens rea in this example was determined by consulting the Arizona jury instructions. The mens rea "elements" of subsection (A)(1) were determined by looking at the face of subsection (B).

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4. **The Indictment, Plea Colloquy, and/or Plea Agreement** (taking a **"peek" at the conviction documents** in the record).

   Note that this is *not* an application of the modified categorical approach. Rather, a "peek" at the documents in this instance is for the **limited purpose of determining whether the items listed in the statute are "elements" of the offense.** This is a bit of a last resort.

Example:

The elements of section 18-18-405(2.3)(a)(I) of the Colorado Revised Statutes (possession with intent) are: "(1) the defendant knowingly; (2) possessed a controlled substance with intent to manufacture, dispense, sell, or distribute." See Colorado Jury Instructions Criminal, § 18.05 (2016).

- *However, after review of the jury instructions and State law, it remains unclear whether the State needs to prove the exact substance involved in the offense such that it is an "element."*
- *We then can "peek" at the charging document which identifies the exact substance involved to the exclusion of all other controlled substances which, in turn, indicates the State believed that proof of the identity of a specific drug was required to sustain a conviction.*
- *Conversely, if the charging document simply charged the respondent with possession with intent to distribute a "controlled substance," which is correlative of the jury instructions which also only state "controlled substance," it would indicate that the State did not believe it had to prove the exact substance involved such that it is not an "element" of the offense but only a possible "means" of commission (along with all the other listed controlled substances).*

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STEP TWO:

Compare the "elements" to the "generic" definition of the offense.

1. If the entirety of the statute as defined by the "elements" falls outside the "generic" definition of the offense, the statute is **"overbroad" and categorically not a predicate offense** for immigration purposes, and the inquiry ends.

2. If the entirety of the statute as defined by the "elements" falls within the "generic" definition of the offense, the statute is **categorically a predicate offense** for immigration purposes, and the inquiry ends.

3. If some offenses under the statute fall within the "generic" definition and some fall outside the "generic" definition, the statute is **"divisible"** and the modified categorical approach should be applied. The modified categorical approach is applied by looking at the judicially recognizable documents in the record to determine under which part of the statute the respondent was convicted.

Note: The **"generic" definition** is found in Board or circuit court case law or is based on the definition provided by Congress in the INA (e.g., where the INA statute cross-references a federal statute in its definition of the offense). Either way, the best way to find the "generic" definition is through case law and **both Board and circuit law** should be consulted.

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- This is especially true of the **"crime of violence"** definition. Some, but not all, circuit courts have recently found the § 16(b) definition unconstitutional. The § 16(a) definition varies widely from circuit to circuit (particularly as to the "violent force" element).

- As to the **"crime involving moral turpitude"** definitions, the comparison can be, but is not always, straightforward and may require a comparison of different cases.

Example:

N.Y.P.L. § 140.25(2) (burglary) provides a defendant is guilty "when he knowingly enters or remains in a building with the intent to commit a crime therein, and ... the building is a dwelling." A "dwelling" is a "building which is usually occupied by a person lodging therein at night."

- *By case law, the elements of the offense are: 1) a knowingly unlawful entry into a dwelling; 2) with the intent to commit a crime therein. The statute does not require the dwelling be occupied at the time of the offense.*

- *This falls somewhere between Matter of M- (burglary requiring only "pushing ajar the unlocked door of an unused structure" not a crime involving moral turpitude) and Matter of Louissaint (burglary involving proof it took place in a dwelling that was occupied at the time of the offense is a crime involving moral turpitude).*

  Note: The ultimate finding was that this burglary offense is a crime involving moral turpitude.

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DOCUMENTS:

Documents that should be provided by the party bearing the BOP.

This includes documents, in addition to the conviction document, that should be provided by the party bearing the burden of proof to show the conviction is/is not a predicate offense for immigration purposes.

- A copy of the **statute** in effect at the time of the conviction.
- A copy of the **jury Instructions** pertaining to the statute, if available. *(Note*: Jury instructions are not available the public in all jurisdictions.)
- **Case law** that establishes the "elements" of the statute (at the time of the conviction).

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Current as of 10.23.2017

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Training

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Falls Church, Virginia 22041

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Date: _____

Checking CASE

- Did the Immigration Judge issue an order in the underlying removal proceedings?
- Did the Board issue an order resolving the appeal of the Immigration Judge's decision in the underlying removal proceedings?
- Did the Immigration Judge issue a bond determination subsequent to the one that is being appealed in the case before you?

Other threshold considerations

- Did the respondent waive his or her right to appeal the Immigration Judge's bond order?
- Is the respondent no longer in the country because he or she has now been removed?
- Is the respondent an arriving alien?
- Has the respondent been issued and served an NTA?

Bond Memorandum

- Prepared by Immigration Judge after an appeal of the bond order has been filed
- Immigration Judge may elect to write reasons on bond order instead
- Immigration Judge must provide detail to enable Board's meaningful review

Mandatory Detention

- If a respondent has a disqualifying criminal offense under **section 236(c)** of the Act, he or she will be ineligible to be considered for bond before the Immigration Judge.
- Even if the DHS did not take the respondent into DHS custody immediately after his or her release from criminal custody, **section 236(c)** is applicable.
- "Release" must be directly tied to the basis for detention under **section 236(c)** of the Act.

Mandatory Detention

- Criminal convictions do not have to be listed on the NTA or be a basis of a removal charge for mandatory detention to be applicable.
- Pursuant to the Board's decision in ***Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999)**, mandatory detention is not applicable if the respondent demonstrates that the DHS is substantially unlikely to prevail on the relevant charge of removability.

Substantive considerations

- Is the respondent a danger to the community (persons or property)?
- Is the respondent a national security threat?
- Is the respondent a flight risk?

Danger to the community

- If a respondent is found to be a danger, a bond cannot be set for the respondent.
- Determination should be of actual danger, not potential danger.
- In considering a respondent's dangerousness, an Immigration Judge can consider more than criminal convictions. It is proper for the Immigration Judge to consider arrests.

Danger to the community

- The focus should be on the seriousness, number, and recency of the criminal offenses.
- Danger and flight risk are separate determinations; the analysis should not be blended.

National security threat

A subset of the danger category; consult *Matter of Fatahi*, 26 I&N Dec. 791 (BIA 2016)

Flight risk

Matter of Guerra factors:

- fixed address,
- length of residence in the United States,
- family ties in the United States
- employment history,
- record of appearance in court
- criminal record
- history of immigration violations
- attempts to flee prosecution
- manner of entry into the United States.

Flight risk

- Eligibility for relief is also a common factor considered by Immigration Judges.
- This list is not exhaustive, and an Immigration Judge has broad discretion.

Final thought

Respond to the specific arguments raised on appeal

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